

(29,286)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 167

McMILLAN CONTRACTING COMPANY AND FIDELITY  
NATIONAL BANK & TRUST COMPANY OF KANSAS  
CITY, APPELLANTS,

*vs.*

WALTER L. ABERNATHY AND CARRIE S. ABERNATHY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE WESTERN DISTRICT OF MISSOURI, TRANSFERRED FROM THE  
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH  
CIRCUIT

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[fol. a]

IN THE

**DISTRICT COURT OF THE UNITED STATES FOR THE  
WESTERN DIVISION OF THE WESTERN DISTRICT OF  
MISSOURI**

In Equity. No. 163

WALTER L. ABERNATHY and CARRIE S. ABERNATHY, Complainants,

v.

McMILLAN CONTRACTING COMPANY, a Corporation, and FIDELITY  
National Bank and Trust Company of Kansas City, a Corporation,  
Defendants.

CITATION AND SERVICE—Filed Jan. 6, 1922

United States of America to Walter L. Abernathy and Carrie S. Abernathy, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit in the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to the petition for appeal and assignment of errors filed in the Clerk's office of the United States District Court for the Western Division of the Western District of Missouri, wherein McMillan Contracting Company, a corporation, and Fidelity National Bank and Trust Company of Kansas City, a corporation, are defendants and appellants, and Walter L. Abernathy and Carrie S. Abernathy are complainants and appellees, to show cause if any there *by* why the judgment and decree entered against said appellants in said cause, as in said assignment of errors mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Arba S. Van Valkenburgh, Judge of said District Court, this 4th day of January, 1922.

Arba S. Van Valkenburgh, District Judge.

Service of the within citation is hereby acknowledged this 6th day of January, 1922, reserving however any right which appellees may have to object to jurisdiction of Court of Appeals and time and manner of taking appeal.

Warner, Dean, Langworthy, Thomson & Borders, Attorneys  
for Walter L. Abernathy and Carrie S. Abernathy, Appellees.

[fol. b] [File endorsement omitted.]

[fol. 1]

CAPTION

UNITED STATES OF AMERICA, set:

Be it remembered, that heretofore, to-wit, at the regular November Term of the United States District Court for the Western Division of the Western District of Missouri, and on the 29th day of January, 1920, an Amended Bill of Complaint was filed in the cause wherein Walter L. Abernathy and Carrie S. Abernathy are Complainants and McMillan Contracting Company, and Fidelity Trust Company are defendants.

Said Amended Bill of Complaint is in words and figures as follows, to-wit:

[fol. 2] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI

[Title omitted]

FIRST AMENDED BILL OF COMPLAINT—Filed Jan. 29, 1920

Now come complainants, Walter L. Abernathy, and Carrie S. Abernathy, and for their cause of action against defendants, and each of them, allege as follows, to-wit:

1. That at and before the filing of the original Bill of Complaint, complainants were and now are, husband and wife, and residents and citizens of Jackson County, Missouri, and defendants, and each of them, were and now are corporations duly organized under and by virtue of the laws of the State of Missouri, and residents and citizens of the State of Missouri, and of the Western District thereof, with their principal offices at Kansas City, Jackson County, Missouri.

2. That this court has jurisdiction of said cause, for the reason that said action is of a civil nature in equity; that the matter and amount in controversy, exceeds, exclusive of interest and costs, the sum or value of Three Thousand (\$3,000.00) Dollars, as hereinafter more fully set forth; that said controversy arises under the Constitution of the United States, and particularly the Fourteenth Amendment thereof, as hereinafter more fully set forth.

3. That heretofore in the year 1908 the City of Kansas City, Missouri, purporting to act pursuant to the Constitution and laws of the State of Missouri adopted its Charter, which said Charter has ever [fol. 3] since, and how is, treated by said City as being in full force and effect; that Section 28 of Article 8 of said Charter, provides that

"Sec. 28. Grading, etc.—When Too Heavy Burden on Benefit District, as Limited in Section 3 of This Article—Benefit Limits May Be Determined by Ordinance.—When in grading or regrading any street, avenue, highway, or part thereof, a very large or unusual amount of filling in or cutting or grading away of earth or rock be necessary, necessitating an expense of such magnitude as to impose

too heavy a burden on the land situate in the benefit district as limited in Section three of this article, and when in grading or regrading, constructing or reconstructing any street, avenue, highway or part thereof, one or more bridges, viaducts, tunnels, subways, cuts or approaches on, along, over or under the same is or are required or needed, the cost of grading or regrading such street, avenue, highway, or part thereof, including the cost of constructing or reconstructing such bridges, viaducts, tunnels, subways and approaches, or any of them, may be charged as a special tax on parcels of land (exclusive of improvements) benefited thereby, after deducting the portion of the whole cost, if any, which the city may pay, and in proportion to the benefits accruing to the said several parcels of land, exclusive of improvements thereon, and not exceeding the amount of said benefit, said benefits to be determined by the Board of Public Works as hereinafter provided, and the limits within which parcels of land are benefited shall in all such specified instances be prescribed and determined by ordinance. If the Common Council shall find and declare in the Ordinance providing for the doing of the work above described that a very large or unusual amount of filling in or cutting or grading away of earth or rock be necessary, necessitating an expense of such magnitude as to impose too heavy a burden on the land situated in the benefit district as limited in Section three of this article, or that in grading or regrading, constructing or reconstructing any street, avenue, highway, or part thereof, one or more bridges, viaducts, tunnels, subways, cuts or approaches on, along, over or under the same is, or are required or needed, the finding and declaration in said ordinance shall be final and conclusive as to all such matters.

Public Works Shall be Provided for by Ordinance—Proceedings in Circuit Court Against Owners—Petition to Contain, What.—The public work described above shall be provided for by ordinance, and the city may provide that after the passage of the ordinance, and after an approximate estimate of the cost of the work shall have been made by the Board of Public Works, the city shall file a proceeding in the Circuit Court of Jackson County, Missouri, in the name of the city, against the respective owners of land chargeable under the provisions of this section with the cost of such work. In such proceeding the city shall allege the passage and approval of the ordinance providing for the work, and the approximate estimate of the cost of said work; and shall define and set forth the limits of the benefit district, prescribed by the ordinance, within which it is proposed to assess property for the payment of said work. The prayer of the petition shall be that the court find and determine the validity of said ordinance and the question of whether or not the respective tracts of land within said benefit district shall be charged with the lien of said work in the manner provided by said ordinance.

Process—What Parties May Offer in Evidence.—Service of process in such proceeding shall be governed by the provisions of Section eleven (11) of Article Thirteen (XIII) of this Charter, relating to service of notice and summons in proceedings for the ascertainment

of benefits and damages for the condemnation of lands for parks and boulevards. In such proceedings, the city shall have the right to offer evidence tending to prove the validity of said ordinance, and said proposed lien against the respective lots, tracts and parcels of land within said benefit district sought to be charged with such lien; and the respective owners of lots, tracts and parcels of land within said benefit district shall have the right to introduce evidence tending to show the invalidity or lack of legality of said ordinance, and said proposed lien against the respective lots, tracts, and parcels of land owned by each respective defendant; and the court shall have the right to determine the question of whether or not the said lots, tracts and parcels of land owned by each defendant should be charged with such lien.

**Trial—Judgment.**—The trial of such proceedings shall be in accordance with the Constitution and Laws of the State, and the court shall render judgment either validating such ordinance, and proposed lien against the lots, tracts and parcels of land within said benefit district or against such lots, tracts or parcels of land as the court may find legally chargeable with the same, or the court may render judgment that such ordinance or proposed lien are, in whole or in part, invalid and illegal.

**Appeal—What Court Shall Determine.**—Any appeal taken from such judgment must be taken within ten days after the rendition of such judgment, or if a motion for a new trial be filed therein, then within ten days after such motion may be overruled or otherwise disposed of; but in all other respects the rules covering such appeal shall be the same as provided by Section Eighteen (18) of Article Thirteen (XIII) of this Charter.

**No Appeal, or After Determination of, City May Enter into Contract, etc.**—If no appeal shall be taken, or after the determination of such appeal the city may enter into a contract with the successful bidder to whom such work may be let; and, after the work under such contract shall have been fully completed, the estimate of the cost thereof, and the apportionment of the same against the various lots, tracts and parcels of land within the benefit district shall be made by the Board of Public Works according to the assessed value thereof, exclusive of improvements, with the assistance of the City Assessor, as provided in Section Three of this article, and all of the [fol. 5] provisions of Section three of this article relating to the apportionment of special assessments, and the levy, issue and collection of special tax bills as in grading proceedings as in said section specified, shall apply to special tax bills issued pursuant to this section, except that said tax bills may be made payable in not to exceed ten annual installments; the number of installments, and the times when payable to be determined by the Common Council on the recommendation of the Board of Public Works, such determination to be determined in the ordinance of the Common Council in which said work is authorized and the proceedings thereof instituted.

Meaning and Intent of this Section.—Nothing in this section stated shall in anywise affect, modify or change the provisions of the previous sections of this article, or in any manner affect or change the proceedings and remedies therein set forth for the doing of the public work and the payment therefor by the issue of special tax bills; the intention of this section being to provide an independent and separate method of public improvements made under the provisions of this section."

4. That in January, 1915, the City Council of Kansas City, Missouri, attempted to pass and enact Ordinance No. 21831, which Ordinance was approved and purported to become effective January 26th, 1915, and provides as follows:

"Ordinance No. 21831

An Ordinance to Grade Meyer Boulevard from the West Line of Swope Parkway to the East Line of the Paseo and to Condemn Easements to Support Embankments or Fills, Describing the Nature of the Improvement, Providing How the Cost Thereof Shall be Paid, and Prescribing the Limits Within Which Private Property is Deemed Benefited by the Proposed Improvement, and Assessed and Charged to Pay Damages Caused by said Grading and by the Condemnation of said Easements, and Assessed and Charged to Pay the Cost of said Improvement

Whereas, the Board of Park Commissioners has, by Resolution No. 1762, adopted on the 11th day of December, 1914, recommended to the Common Council of Kansas City that Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, be graded to the full width thereof, and to the established grade of the same, and that easements to support embankments or fills be condemned, and

Whereas, the Board of Public Works, by its Resolution under Entry No. 73992, on the 11th day of December, 1914, has joined in said recommendation, now, therefore,

Be it ordained by the Common Council of Kansas City:

Section 1. That the boulevard or highway known and designated as Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, be graded to the full width thereof and to the established grade of the same.

[fol. 6] Section 2. That as the proposed grading of said Meyer Boulevard, or part thereof, to the established grade for the full width thereof will cause certain embankments or fills to be made leaving abutting property below the proposed grade of said boulevard or highway, there is hereby condemned in said abutting property easements or right to support said embankments or fills so far as may be necessary to bring the said boulevard or highway to the required



grade, and by allowing the material of which said embankments are made to fall upon the abutting land at the natural slope so that the surface of the boulevard or highway may be graded to the full width thereof. The areas of land in which said easements are condemned are shown in the plat forming part of the plans hereinafter referred to in Section 3 hereof, prepared and on file in the office of the Board of Park Commissioners, showing a profile of the portion of said boulevard or highway proposed to be graded and indicating thereon approximately the amount of the encroachment of the embankments upon the abutting property, which said plat is hereby referred to and identified. Just compensation for the easements herein condemned shall be assessed, collected and paid according to law.

Section 3. Said work and improvements shall be of the nature described and specified in, and shall be in accordance with, the plans and specifications, adopted, perfected and approved by the Board of Public Works, on the 11th day of December, 1914, by Resolution under its entry Number 73991, and by the Board of Park Commissioners of Kansas City, Missouri, on the 11th day of December, 1914, under Resolution No. 1761, which said plans and specifications are now on file in the office of said Board of Park Commissioners. Said improvement is hereby provided for and authorized.

Section 4. Whereas, private property may be disturbed or damaged by the grading herein provided for and authorized and by the condemnation of the easements herein provided for, and the owners thereof lawfully entitled to remuneration or damages under the constitution of this state have not waived all right or claim thereto, it is ordered that proceedings to ascertain and assess all such damages or remuneration be begun and carried on as provided by Article VII of the Charter of said City; and the Common Council prescribes and determines the limits within which private property is deemed benefited by the proposed grading and improvement herein provided, and within which said property may be assessed or charged to pay such remuneration or damages, including the taking and damaging of private property for public use for or in the acquiring of said easements, to be as follows, to-wit:

Beginning at the intersection of the south line of Sixty-third (63rd) Street with the west line of the east half of the east half of the northwest quarter of the southeast quarter of Section No. Four (4), Township No. Forty-eight (48) North, Range No. Thirty-three (33) West; thence east along the south line of Sixty-third (63rd) [fol. 7] Street and said line prolonged east to the east line of the west half of the southeast quarter of Section No. Three (3), Township No. Forty-eight (48) North, Range No. Thirty-three (33) West; thence south along the east line of the west half of the southeast quarter of said Section No. Three (3) to the east prolongation of the north line of Sixty-seventh (67th) Street west of Swope Parkway; thence west along the east prolongation of the North line of Sixty-seventh (67) Street and along the north line of Sixty-seventh (67th) Street to the West line of Brooklyn Avenue; thence North



along the West line of Brooklyn Avenue to a point two hundred (200) feet south of the south line of Meyer Boulevard; thence west to a point in the east line of The Paseo ten hundred seventy-nine and nine-hundredths (1,079.09) feet south of the north line of the southwest quarter of the southeast quarter of said Section No. Four (4); thence north along the east line of The Paseo and said line prolonged north, said line being two hundred forty-seven and three-tenths (247.3) feet west of and parallel with the east line of the southwest quarter of the southeast quarter of said Section No. Four (4), to the north line of the southwest quarter of the southeast quarter of said Section No. Four (4); thence west along the north line of the southwest quarter of the southeast quarter of said Section No. Four (4) to the southwest corner of the east half of the east half of the northwest quarter of the southeast quarter of said Section No. Four (4); thence north along the west line of the east half of the east half of the northwest quarter of the southeast quarter of said Section No. Four (4) to the point of beginning.

Section 5. The Common Council hereby finds and declares that in the grading of said boulevard or highway a very large or unusual amount of filling in, or cutting or grading away of earth or rock is necessary, necessitating an expense of such magnitude as to impose too heavy a burden on the land situate in the benefit district as limited in Section 3 of Article VIII of the Charter of Kansas City.

Section 6. The cost of grading said boulevard or highway as provided herein, shall be charged as a special tax on parcels of land (exclusive of improvements) benefited thereby after deducting the portion of the whole cost, if any, which the City may pay, and in proportion to the benefits accruing to the said several parcels of land, exclusive of improvements thereon, and not exceeding the amount of said benefits, said benefits to be determined by the Board of Public Works and after said work shall have been fully completed, the cost thereof shall be estimated by the said Board of Public Works and shall be apportioned by said Board of Public Works against the various lots, tracts and parcels of land within the benefit district, according to the assessed value thereof, exclusive of improvements, as provided in Section 28 of Article VIII of the Charter of Kansas City aforesaid; and the limits within which parcels of land are benefited as aforesaid, and within which it is proposed to assess property for the payment of said work and improvement, are hereby prescribed and determined to be the same limits as are hereinbefore, in Section 4 of this Ordinance, prescribed and determined as the limits within which private property is deemed benefited by the proposed grading of said boulevard or highway, all in pursuance of Section 28 of Article VIII of the Charter of Kansas City, aforesaid.

Section 7. Payment of the cost of all of said work shall be made in Special Tax Bills evidencing special assessments made and levied against each lot or parcel of land chargeable therewith respectively, as set forth in Section 6 of this Ordinance. Said Tax Bills shall be

payable in ten (10) annual installments according to law, the first of said installments to become due and collectible as provided in Section 25 of Article VIII of the Charter of Kansas City aforesaid, in the case of Tax Bills payable in installments, and the remaining installments shall be due and collectible, one each year thereafter, on the 30th day of June of each year until all said installments are paid.

The Common Council hereby finds and declares that its action herein has been recommended by the Board of Public Works, and also by the Board of Park Commissioners.

The improvement provided for herein the Common Council deems necessary to have done, but the passage of this Ordinance and the doing of such work shall not render Kansas City liable to pay for such work, or any part thereof, otherwise than by the issue of Special Tax Bills, and except as herein provided.

Section 8. The Board of Public Works shall make an approximate estimate of the cost of the work herein provided for, and after the passage of this Ordinance, and after such approximate estimate of the cost of said work shall have been made by said Board, a proceeding separate from the proceeding provided for in Section 4 of this Ordinance, shall be filed in the Circuit Court of Jackson County, Missouri, in the name of the City, against the respective owners of land chargeable under the provisions of Section 28 of Article VIII, of the Charter of Kansas City aforesaid, with the cost of said work, for the purpose, and in the manner prescribed in said Section 28, of Article VIII of the Charter of Kansas City, Missouri, and as provided in this Ordinance.

Section 9. The Common Council hereby finds and declares that its action herein has been recommended by the Board of Park Commissioners of Kansas City, Missouri, and by the Board of Public Works, and that the said Boards have recommended to the Common Council that the above mentioned boulevard or highway be graded to the full width thereof as herein provided for and that easements to support embankments or fills be condemned as herein provided for and that payment for all said work be made in Special Tax Bills as herein provided for; and the action of said Board of Park Commissioners and the Board of Public Works in determining that said work shall be done and that the payment for same be made in special tax bills is hereby ratified and confirmed.

Section 10. All Ordinances, or parts of Ordinances in conflict with this Ordinance, are, insofar as they conflict with this ordinance, hereby repealed."

[fol. 9] A copy of which said plat referred to and provided for in said Ordinance is hereto attached, marked Exhibit "A" and made a part hereof.

5. That said Ordinance No. 21831, and particularly Section 8 thereof, provides and requires that after the passage of said ordinance and the approximate estimate of the cost of said work shall

have been made by said Board of Public Works, that a proceeding, separate from the proceeding provided for in Section 4 of said ordinance, shall be filed in the Circuit Court of Jackson County, Missouri, in the name of Kansas City against the respective owners of land chargeable under the provisions of Section 28 of Article VIII of the Charter of Kansas City, aforesaid, with the cost of said work, for the purposes and in the manner prescribed in said Section 28 of Article VIII of said Charter. That no suit or proceeding was brought or prosecuted in said Circuit Court of Jackson County in the name of Kansas City against the respective owners of the land to be charged with the cost of said work, as required by said ordinance, and hence the Board of Park Commissioners was without right or authority to let a contract for said work, and the Board of Public Works was without right or power to apportion or levy the cost of said work against the lands in said benefit district, or to issue tax bills for such work against said lands. That no suit or proceeding was instituted in said Circuit Court, except that on or about February 17, 1915, there was instituted certain proceedings entitled, "In the Matter of the Grading of Meyer Boulevard from the West Line of Swope Parkway to the East line of The Paseo, under Ordinance of Kansas City, Missouri, No. 21831, approved the 26th day of January, 1915," being Cause No. 90628 in said Circuit Court, by which pretended proceeding it was sought to have the property located within the benefit district, described in said ordinance, charged with [fol. 10] a lien or a special tax on parcels of land located in said benefit district to pay for the cost of grading said boulevard or highway, as provided in said ordinance.

6. That all of the times herein referred to, complainant, Carrie S. Abernathy, was, and now is, the owner of the following tracts of real estate situated in Kansas City, Jackson County, Missouri, to-wit:

All of that part of the East Half of the Northeast Quarter of the Southeast Quarter of Section Four (4), Township Forty-eight (48), Range Thirty-three (33), lying west of the west line of Prospect Avenue, and between the south line of 63d Street, and the north line of 65th Street, in Kansas City, Missouri.

And also that part of the West Half of the Northeast Quarter of the Southeast Quarter of Section Four (4), Township Forty-eight (48), Range Thirty-three (33), lying East of the east line of Brooklyn Avenue, and between the south line of 63d Street, and the north line of 65th Street, in Kansas City, Missouri.

which said real estate was and now is within the benefit district provided for in said Ordinance, and by virtue of said Section 28 of Article VIII of the Charter of Kansas City, Missouri, and by virtue of said Ordinance No. 21831, and by virtue of said proceedings so instituted in the Circuit Court of Jackson County, Missouri, hereinbefore referred to, said Kansas City sought to have said real estate so owned by said complainants, together with other real estate in said benefit district, charged with a lien or special tax, for the purpose of

paying the costs of grading said Meyer Boulevard, as provided in said Ordinance.

7. That said proceeding was not brought in the name of Kansas City, and was not against the respective owners of land chargeable under the provision of Section 28 of Article VIII of the Charter of Kansas City, with the cost of said work, and was not against the complainants herein, or either of them. That complainants never received any notice by summons or otherwise of said proceeding and did not appear therein; that complainants are informed and believe, and therefore allege the fact to be that no evidence was introduced in said proceeding and no trial had therein, but that a pretended judgment was entered therein purporting to find and adjudge that said Ordinance No. 21831, hereinabove referred to, was valid and legal, and that a contract for the doing of the work provided for in said Ordinance might be entered into by Kansas City in conformity with said Ordinance, and as provided by the Charter and Ordinance of Kansas City, and that the proposed lien of the assessments for the payment of the cost of the work provided for in said Ordinance under said contract against the respective lots, tracts and parcels of land within the benefit district prescribed in said Ordinance, and each of them, respectively, are assessed, apportioned and charged in the manner provided by said Ordinance and Charter of Kansas City, shall be a valid and legal lien, and that said lots, tracts and parcels of land within said benefit district, might be charged with said lien respectively.

8. That, on or about October 26, 1915, the Board of Park Commissioners of Kansas City, Missouri, attempted to enter into a contract with the defendant McMillan Contracting Company for the work of grading said boulevard. That thereafter said McMillan Contracting Company proceeded with the work of grading said boulevard, and after said work was completed, or claimed to have been completed, the Board of Public Works of Kansas City, Missouri, proceeded to assess the cost of said grading against said parcels of land located within said benefit district, including said land owned by complainant, Carrie S. Abernathy, attempting to apportion the cost of such grading in accordance with the assessed value of said respective parcels of land, exclusive of improvements, under the provisions of said Section 28 of said Article VIII of the Charter of Kansas City, Missouri, and said Ordinance No. 21831; that in attempting to apportion said costs, as aforesaid, the Board of Public Works of Kansas City, Missouri, on or about November 14, 1916, directed the City Assessor to make an assessment as to the value of said lands located in said benefit district, and on or about November 18th, 1916, the City Assessor assessed the value of the first of said tracts of land owned by complainant, Carrie S. Abernathy, at a value of Twenty-four Thousand nine hundred twenty (\$24,920.00) Dollars, and assessed the second of said tracts of land so owned by said complainant, Carrie S. Abernathy, at the sum of Twenty-four thousand five hundred seventy (\$24,570.00) Dollars; that thereupon, on or about the

21st day of November, 1916, the said Board of Public Works of Kansas City Missouri, certified that it had apportioned the cost of the grading of Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, among the lots and parcels of land to be charged therewith, and that it had charged each lot or parcel of land with its proper share of said cost, and said Board of Public Works charged and apportioned against the first of said tracts of land, owned by said complainant, Carrie S. Abernathy, as its share of said cost, the sum of Sixty-four hundred twenty-four (\$6,424.00) Dollars, and against the second of said tracts of land so owned by said complainant, Carrie S. Abernathy, as its share of said cost, the sum of Sixty-three hundred thirty-three and 80/100ths (\$6,333.80) Dollars; that thereupon, on or about November 23d, 1916, special tax bills were issued by Kansas City, Missouri, to said McMillan Contracting Company, against the first of said tracts of land in said sum of Sixty-four hundred twenty-four (\$6,424.00) Dollars, and against the second of said tracts of land, in the sum of Sixty-three hundred thirty-three and 80/100ths (\$6,333.80) Dollars; that thereupon the said McMillan Contracting Company sold and assigned some interest in and to said tax bills to the defendant, Fidelity Trust Company, the exact nature of which interest, the complainants do not know, and therefore cannot allege.

[fol. 13] 9. Kansas City has a park presented to it by Thomas H. Swope in his lifetime containing about 1,400 acres. It is situated in the extreme Southeast corner of its municipal limits. It contains many miles of parkways, drives and walks; it also has lakes, golf grounds, tennis courts, zoological museum, groves, and is the principal play ground or place of resort for Kansas City. Frequently from fifty to seventy-five thousand people go there in a single day in agreeable weather, and on other days twenty, thirty and forty thousand go there during the spring, summer and autumn seasons. There is in effect and substance but one approach, that is, by Swope Parkway. Swope Parkway in many respects is not as attractive as the park itself, and furnishes inadequate facilities to the thousands who go to this park, and the number going is constantly increasing. It was desired by the municipal authorities of Kansas City to construct another entrance running East and West from The Paseo, a boulevard extending  $6\frac{3}{4}$  miles from Seventh Street to the proposed highway, which has been designated as Meyer Boulevard. By the construction of Meyer Boulevard far better and more attractive access will be given to Swope Park. The proposed boulevard is 5,614.36 feet in length and varies in width. At some places it is 500 feet in width, and at others 220 feet in width. At no place is it less than 220 feet in width. Near the entrance of the Park, and for several hundred feet said proposed boulevard is 500 feet in width, and at the junction of The Paseo and this proposed boulevard, the width is — feet. It is funnel shaped at this point. It is proposed to have driveways for automobiles and other vehicles and wide sidewalks on both sides of this boulevard, and grass plats running through the center. The cost of the grading of this park will equal the sum of

\$97,688.90. The great proportion of the population of Kansas City is far north of Meyer Boulevard, and far north of Sixty-third Street. The complainants own forty acres of ground hereinabove particularly described fronting on Sixty-third, and at no place fronting on this [fol. 14] boulevard, but at the closest point 493 feet therefrom, and at the farthest point 656.51 feet therefrom. The complainants' property and that in the neighborhood is rural property, almost agricultural in its present condition. Complainants have a house and barn on their forty acres, woods, and some gardens. It is proposed to put the cost of this improvement upon the neighboring property holders, including the complainants. The improvement is, as shown, of the most general character and designed for all the people of the city. At present the west twenty acres of the property of the complainants is not accessible to this highway and may not be for years to come. It is manifestly an improvement of a general nature and taxes of a special nature are sought to be imposed for the payment thereof as hereinafter shown, all of which is undertaken to be done under certain provisions of a municipal charter of Kansas City hereinabove set out.

10. That said Section 28 of Article VIII of the Charter of Kansas City, Jackson County, Missouri, and said Ordinance No. 21831, and said assessment attempted to be made against said property of said complainants, and said tax bills attempted to be issued against said property of complainants, were and are unconstitutional, null and void, for the reason that they, and each of them, if enforced, will deprive complainants of their property without due process of law, and in violation of the Fourteenth Amendment to the Constitution of the United States, in that the said property of complainants, although located a great distance from said boulevard, is, pursuant to said section of said Charter, and said Ordinances, and said assessments, sought to be charged with the same benefits, and in the same proportion, as property immediately abutting upon said boulevard, and which is necessarily benefited greatly in excess of all property which does not adjoin and abut upon said boulevard, and especially property located as that of complainants at a great distance from said [fol. 15] boulevard, in that said Section 28 of Article VIII, and said Ordinance and said proceedings hereinabove referred to, do not, and did not, provide, give or grant to this defendant any opportunity to be heard as to the apportionment of the benefits resulting from the cost of said grading among the various tracts of property in the benefit district, but that said section of said Charter and said Ordinance provides for an arbitrary and unfair and discriminatory method of apportionment, which is violative of the Fourteenth Amendment to the Constitution of the United States, as hereinabove set forth, and in that complainants had no valid notice or opportunity to be heard in relation to the value at which their property was assessed by the City Assessor, nor as to the amount of benefits, if any, accruing, to it, by reason of said improvements; and for the further reason that no suit or proceeding was instituted in the Circuit Court against the respective owners of the land to be charged with



the cost of said work or against these complainants, or either of them, as required by said Charter and by said ordinance, as aforesaid.

11. Complainants further state that the pretended benefit district described in and fixed by said ordinance of Kansas City, No. 21831, was unreasonable, discriminating, arbitrary and unjust, and was such as to place an unconscionable burden and inequitable proportion of the cost of said work upon the lands of complainants; a large amount of land, including the said tracts of complainants, lying a long distance north of and not abutting on or nearly approaching said Meyer Boulevard, and not especially benefited by the grading of Meyer Boulevard, was included within said benefit district while a large amount of land east and south of said Meyer Boulevard, particularly and peculiarly and obviously benefited by the grading of said Meyer Boulevard, was left wholly out of said benefit district and was not assessed at all for such grading. Complainants further state that the benefits district described in said Ordinance No. 21831 [fol. 16] was limited and confined to a relatively small territory, thereby fixing the improvement of Meyer Boulevard in question as one of a purely local nature and benefit, while, as a matter of fact, the improvement was not of a local nature, but was designed to be and is of a general nature and for the general public benefit, as aforesaid. Said Meyer Boulevard is not, in fact, a street or boulevard, but is, in fact, a great and broad parkway varying from two hundred twenty to five hundred feet in width, and it is not appropriate, necessary or useful to nor a peculiar local benefit to the lands abutting on it or adjacent thereto, or to the lands in said benefit district, the same being unimproved, unplatted suburban lands, as aforesaid. And, although said Meyer parkway is primarily and obviously a benefit to said Swope Park, and to the general public, neither said park lands were assessed anything toward the cost of said grading, although said park lands might, under the charter of Kansas City, have legally been so assessed, nor did the city or general public otherwise contribute or pay any part of the cost of said grading, although such is contemplated by the charter of Kansas City.

Complainants further state that the benefit district, fixed by said Ordinance is such that it extends north of said Meyer Boulevard a distance varying from one thousand three hundred eighty seven feet at the east line of the benefit district to a distance of two thousand one hundred ninety six feet at the west line of the benefit district, while on the south of said Meyer Boulevard the benefit district extends only a distance of about three hundred seventy feet at the west line of the benefit district and about six hundred fifty feet at the east line of the benefit district the result being the amount of [fol. 17] land in the benefit district lying north of Meyer Boulevard is more than double the amount of land in the benefit district lying south of the boulevard, whereas, it is an obvious and palpable fact that the owners and occupants of the land lying north of said boulevard, and toward the center of the city, will have practically no use of nor benefit from said boulevard, while the owners and occupants of the land south of said boulevard will have some use

of said boulevards as an approach to and from the center of the city. And, notwithstanding the obvious fact that the land north of said boulevard has less use of and less benefit from said Meyer Boulevard than the land on the south, the land north of said boulevard was assessed over seventy one thousand dollars (\$71,000.00) or about 73% of the cost of grading said boulevard, while the land south of said boulevard was assessed only about twenty six thousand dollars (\$26,000.00), or only about 27% of the cost of grading said boulevard.

Complainants further state that all the land in said benefit district fixed by said Ordinance No. 21831 is unplatted and unimproved suburban land, there being no house or other improvement fronting on said boulevard and no house or other edifice, except one, in the entire benefit district. The lands in said benefit district are purely acre properties, and are of small value, and the lands that do not abut on said Meyer Boulevard, and such are the lands of complainants, were assessed by the city assessor, as aforesaid, for the purpose of this proceeding, equally as high or higher per acre than the lands abutting upon the boulevard and the apportionment of the assessments of the said cost of grading Meyer Boulevard was laid ratably over the lands in said benefit district according to the said [fol. 18] assessed value, the result being that lands far removed, much of it more than one-fourth of a mile distant from and north of said Meyer Boulevard, were taxed for said grading, per acre equally with or greater than the land abutting on said boulevard. None of the lands in the benefit district were laid off into lots and blocks, and so it is true that the land abutting and adjacent to the said boulevard and extending back therefrom to a depth of one hundred fifty feet, which, according to Article VIII of Section 3 of the Charter of Kansas City, should be deemed as the land abutting upon a boulevard and be chargeable with grading costs, was assessed with but approximately twelve thousand dollars (\$12,000.00), or only about 12 per cent of the cost of said grading, while the lands in the benefit district that do not abut on said boulevard or lie within one hundred fifty feet thereof and are but little, if at all, specially benefited by said grading, were assessed with about eighty-five thousand (\$85,000.00) dollars, or about 88 per cent of the cost of said grading, and thus the land of complainants lying far removed from said boulevard is taxed more than the aggregate of all lands abutting thereon, although no greater in area.

Complainants state that the taxing of their lands, which are far removed from and have no access to or use of said boulevard, at the same rate as the lands immediately fronting on and particularly benefited by said boulevard, was in violation of said Section 28 of Article VIII of the Kansas City Charter, which requires that the tax for such grading costs shall be laid "in proportion to the benefits accruing to the several parcels of land" in the benefit district, and was palpably discriminatory, inequitable and unjust.

Complainants state that their said lands were assessed in a purely [fol. 19] arbitrary, unjust and discriminatory manner and not in accordance with or in consideration of the benefits to said lands by



reason of said improvements, and that the assessments made and tax bills issued against their said lands are far in excess of the special benefits, if any, accruing to their lands by reason of such grading, and are so great as to amount to a confiscation of complainants' lands.

12. That the said defendants threaten to proceed to enforce said tax bills against the property of complainants, and said tax bills constitute a cloud upon the title of complainants to the said premises.

13. That complainants have no adequate remedy at law.

Wherefore, Complainants pray the court as follows:

1. That a subpoena may issue out of this Honorable Court, directed to said defendants, requiring and commanding them, and each of them, to appear in this Court on a day certain, and answer the several allegations in this bill of complaint contained, an answer under oath being hereby expressly waived;

2. That during the pendency of this cause, a temporary injunction be issued against the defendants, and each of them, restraining and enjoining them, and each of them, until further order of this court, from transferring or otherwise disposing of said tax bills, and from enforcing or attempting to enforce the lien of said tax bills against the property of these complainants;

3. That on the final hearing of said cause, said tax bills, and each of them, be cancelled and set aside and for naught held, and that the property of these complainants be adjudged and declared to be free of any and all liens on account of said tax bills, and on account of said Ordinance No. 21831, and all proceedings taken thereunder, [fol. 20] and all assessments attempted to be levied or assessed against the property of these complainants pursuant thereto;

4. That complainants have such other and further relief as to the court may seem meet, equitable and proper.

Warner, Dean, McLeod, Langworthy, Roy B. Thomson, Attorneys for Complainants.

STATE OF MISSOURI,

County of Jackson, ss:

Roy B. Thompson, of lawful age, being duly sworn, says that he is agent and attorney for the complainants herein, and as such is authorized to and does make this affidavit; that he has read the foregoing Amended Bill of Complaint, knows the contents thereof, and the statements therein contained are true to the best of his knowledge and belief.

Roy B. Thompson.

Subscribed and sworn to before me this 20th day of January, 1920. My Commission expires August 26, 1920. Mary M. Friel, Notary Public Within and for said County and State. (Seal.)

Received copy of the within first amended complaint this 20th day of January, 1920.

Bowersock & Fizzell, Attys. for Def. Fid. Nat. Bk. & Trust Co.  
R. E. Ball, Att'y. for McMillin Contracting Co.

The plat attached to the Bill of Complaint as Exhibit A is the same as Plaintiff's Exhibit 12 introduced at the trial of this cause and same is omitted here for the reason that the original Exhibit is sent to the Court of Appeals pursuant to stipulation of the parties herein.

[fol. 21] And afterwards, to-wit, on the 25th day of January, 1921, the Amended Separate Answer of Fidelity National Bank and Trust Company of Kansas City, formerly Fidelity Trust Company, was filed.

Said Amended Separate Answer is in words and figures as follows, to-wit:

[fol. 22] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
WESTERN DIVISION OF THE WESTERN DISTRICT OF  
MISSOURI, NOVEMBER TERM, 1920

[Title omitted]

AMENDED SEPARATE ANSWER OF DEFENDANT FIDELITY NATIONAL  
BANK AND TRUST COMPANY OF KANSAS CITY—Filed Jan. 25, 1921

Comes now Fidelity National Bank and Trust Company of Kansas City, a corporation, formerly Fidelity Trust Company, defendant in the above entitled cause, and by leave of Court first had and obtained files its amended separate answer to complainants' first amended bill of complaint herein, and answering said bill of complaint states:

1. Answering paragraph 1 of said complaint this defendant states that it is a corporation duly organized and existing under the laws of the United States as a national banking corporation, with its principal office and place of business at Kansas City, in the Western District of Missouri. This defendant is without knowledge or information as to the residence and citizenship of complainants and the other defendant hereto.

2. This defendant admits that this is an action of a civil nature, in equity, wherein the matter and amount in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000.00) as alleged in paragraph 2 of said bill of complaint.

[fol. 23] 3. This defendant admits, and alleges the fact to be, that in 1908 the City — of Kansas City, Missouri, acting pursuant to the constitution and laws of the State of Missouri, adopted its present charter, providing in Section 28 of Article VIII as set forth in paragraph 3 of said bill of complaint.

4. Defendant admits, and alleges the fact to be, that in January, 1915, the City Council of Kansas City, Missouri, passed and enacted Ordinance No. 21831, as set forth in paragraph 4 of said bill of complaint, and that said Ordinance was approved and became effective January 26, 1915.

5. Defendant admits that Section 28 of Article VIII of the Charter of Kansas City, and Ordinance No. 21831, provide that a proceeding separate from the proceeding provided for in Section 4 of said Ordinance shall be filed in the Circuit Court of Jackson County, Missouri, in the name of Kansas City, against the respective owners of land chargeable under the provisions of said charter with the cost of the work, all as alleged in paragraph 5 of said bill of complaint. Defendant denies the allegations of said paragraph to the effect that no such suit or proceeding was brought or prosecuted as required by said charter and Ordinance, and that the Board of Park Commissioners was without right or authority to let a contract for said work, and that the Board of Public Works was without right or power to apportion or levy the cost of said work against the lands in the benefit district set forth in said Ordinance, or to issue tax bills for such work against said lands.

6. With the exception of the allegations as to the present ownership of the tracts of land described in paragraph 6 of complainant's bill, defendant admits the facts and things set out in said paragraph, but as to such present ownership defendant is without knowledge or information.

[fol. 24] 7. Defendant admits and alleges that a judgment was entered in the suit in the Circuit Court of Jackson County, Missouri, referred to in paragraph 7 of said bill of complaint, finding and adjudging the validity of said Ordinance No. 21831, and of the proposed lien of the assessments for the payment of the cost of the work, all as more fully hereinafter set forth. Defendant denies the other allegations of said paragraph.

8. Defendant admits and alleges that the facts, proceedings and things set forth in paragraph 8 of said bill of complaint were actually had and done, and denies that any of said facts, proceedings or things were merely pretended or claimed to have been done.

9. Defendant denies the allegations of paragraph 9 of complainant's bill.

10. Defendant denies the allegations of paragraph 10 of said bill of complaint.

11. Defendant denies the allegations contained in paragraph 11 of said bill of complaint.

12. Defendant denies the allegations contained in paragraph 12 of complainants' bill, but alleges that the tax bills in question constitute a valid and existing lien against complainants' lands.

13. Defendant denies that complainants have no adequate remedy at law.

14. And for further answer to said bill of complaint, defendant states that on or about February 17, 1915, the proceeding provided for in Section 8 of said Ordinance No. 21831, and in Section 28 of Article VIII of said charter, referred to in paragraph 5 of complainants' bill, was duly filed, in the Circuit Court of Jackson County, Missouri, at Kansas City, being cause No. 90628 in said Court; that in said proceeding service was duly had according to law on all of the owners of the lands within the benefit district prescribed by said Ordinance No. 21831, and on all parties interested in said proceeding; that a hearing was duly had therein of which [fol. 25] complainants herein had actual notice, and at which they appeared, and that on May 17, 1915, a judgment was duly entered in said Court finding and adjudging that said Ordinance No. 21831 is valid and legal, and that a contract for the doing of the work provided for therein might be entered into by Kansas City in conformity with said Ordinance, and that the proposed lien of the assessments for the payment of the cost of said work against the respective lots, tracts and parcels of land within the benefit district, described in said Ordinance, and against the respective lots, tracts and parcels of land owned by the respective defendants in said proceeding, and each of them respectively, when assessed, apportioned and charged, as provided in said Ordinance and said Charter, is and shall be a valid and legal lien; that no appeal was taken from said judgment, and that the same became and is final and binding; that thereafter the Board of Park Commissioners of Kansas City duly entered into a contract with McMillan Contracting Company for the work of grading said boulevard, and that thereafter Ordinance No. 24693, entitled "An ordinance providing for and authorizing the work of grading Meyer Boulevard from the west line of Swope Parkway to the east line of the Paseo, stating the nature of the improvement, how the cost thereof shall be paid and how the assessments therefor shall be made and levied, and ratifying, approving and confirming a contract thereof with the McMillan Contracting Company," was duly passed by the Common Council of Kansas City, Missouri, and duly approved by the Mayor on December 9, 1915; that thereafter all of the proceedings necessary and proper for the issuance of the tax bills described in complainants' bill of complaint were duly and legally had and that said tax bills were duly issued in accordance with law.

[fol. 26] Defendant states that all of the proceedings aforesaid were regular and legal; that said tax bills are a valid lien on the land described herein; that all questions involved in said proceeding

in the Circuit Court of Jackson County, Missouri, at Kansas City, were finally adjudged and decreed therein, that such final adjudication is in full force and effect, and is binding upon complainants herein, and is a bar to this action.

Defendant states that the complainants herein had notice of the pendency of the proceedings above referred to, to charge the lands described in said bill of complaint with the lien of said special tax bills, and that throughout all of the said proceedings and the doing of said work, said complainants were in possession of said lands and received and are now receiving the benefits of said work, and that it is contrary to equity and good conscience for complainants, at this late date, and after the completion of said work, and the issuance and sale of said tax bills, to attack the validity of said proceedings or of said tax bills.

Defendant states that in the action or actions to enforce said tax bills complainants will have an adequate opportunity to be heard on any questions complained of herein and not heretofore finally adjudged.

Wherefore, defendant prays that complainants take nothing herein and that defendant go hence without day and recover its costs herein incurred and expended, and for such other and further relief as to the Court may seem equitable and just.

Bowersock & Fizzell, Attorneys for Defendant Fidelity National Bank and Trust Company of Kansas City.

Received copy of the above amended answer, and consent to the filing thereof, this 24 day of January, 1921.

Warner, Dean, Langworthy, Thomson & Williams, Attorneys for Complainants.

[fol. 27] And afterwards, to-wit, on the 28th day of January, 1921, the Reply of Complainants to the Amended Separate Answer of Fidelity National Bank and Trust Company was filed.

Said Reply is in words and figures as follows, to-wit:

[fol. 28] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
WESTERN DIVISION OF THE WESTERN DISTRICT OF  
MISSOURI

[Title omitted]

REPLY TO AMENDED SEPARATE ANSWER OF DEFENDANT—Filed Jan.  
28, 1921

Now come complainants, and for their reply to the answer of the Fidelity National Bank & Trust Co., herein, deny each and every allegation of new matter therein contained. Complainants deny that there was brought in the Circuit Court of Jackson County, Missouri, the suit provided by Section 28 of Article VIII of the

Kansas City Charter and by Ordinance of Kansas City, No. 21831, to determine the validity of said ordinance, and deny that Cause No. 90628 in the Circuit Court of Jackson County, Missouri, mentioned in said defendant's answer, was such a suit as required by said ordinance and charter or that complainants appeared therein, and complainants further state that the petition in said Cause No. 90628 in the Jackson County Circuit Court did not state facts sufficient to constitute any cause of action or to invoke any relief in a court of equity on behalf of Kansas City, or any other party, and that the said Circuit Court was without jurisdiction to enter any finding or judgment in said pretended cause because there was no proper service of process therein and no sufficient facts were stated in the petition therein to constitute any cause of action at law or [fol. 29] in equity, and because said pretended action did not institute a real controversy, but a fictitious one, and there was an attempt to submit a mere moot question; and complainants state that in said pretended action there was not identity of either subject matter or parties with the present action; and complainants further state that to hold that said pretended cause No. 90628 determined or adjudicated all or any of the rights of complainants herein would be in violation of Section 28 of Article II of the Constitution of Missouri, which provides that the right of trial by jury shall remain inviolate and would be contrary to the Seventh Amendment to the Constitution of the United States, which guarantees the right of trial by jury, and would be taking complainants, property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States. And complainants deny that they or either of them had any actual notice or knowledge of said pretended action.

Wherefore, Complainants pray judgment as in their complaint herein.

Warner, Dean, Langworthy, Thomson & Williams, Attorneys  
for Complainants.

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[fol. 30] And afterwards, to-wit, on the 7th day of July, 1921, Final Decree was filed and entered of record.

Said Final Decree is in words and figures as follows, to-wit:

[fol. 31] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
WESTERN DIVISION OF THE WESTERN DISTRICT OF  
MISSOURI

[Title omitted]

FINAL DECREE—Filed July 7, 1921

This cause was heretofore submitted to and heard by the court upon the pleadings and evidence, and was by the court taken under advisement, and said cause came on to be further heard at this term, and the court having examined and considered the briefs and argu-



ments of counsel, and being fully advised in the premises, doth find that complainants are entitled to the relief prayed for in the bill of complaint herein.

Wherefore, It is by the court, considered, ordered, adjudged and decree as follows:

1. That Special Tax Bill No. 14, for the sum of \$6,424.00, dated on or about the 21st day of November, 1916, issued by Kansas City, Missouri, to McMillan Contracting Company, pursuant to Ordinance of Kansas City, Missouri, No. 21831, approved January 26th, 1915, and Ordinance No. 24693, approved December 9, 1915, for the grading of Meyer Boulevard, against and upon the tract of land belonging to complainant, Carrie S. Abernathy, described as follows, to-wit:

All of that part of the East Half ( $\frac{1}{2}$ ) of the Northeast Quarter ( $\frac{1}{4}$ ) of the Southeast Quarter ( $\frac{1}{4}$ ) of Section Four (4), Township Forty-eight (48), Range Thirty-three (33), lying west of the west line of Prospect Avenue, and between the south line of Sixty-third Street, and the north line of Sixty-fifth Street, all in Kansas City, Jackson County, Missouri,

be and the same is hereby canceled, set aside and for naught held.

[fol. 32] 2. That Special Tax Bill No. 15, for the sum of \$6,333.80, dated on or about the 21st day of November, 1916, issued by Kansas City, Missouri, to McMillan Contracting Company, pursuant to Ordinance of Kansas City, Missouri, No. 21831, approved January 26, 1915, and Ordinance No. 24693, approved December 9, 1915, for the grading of Meyer Boulevard, against and upon the tract of land belonging to complainant, Carrie S. Abernathy, described as follows, to-wit:

All of that part of the West Half ( $\frac{1}{2}$ ) of the Northeast Quarter ( $\frac{1}{4}$ ) of the Southeast Quarter ( $\frac{1}{4}$ ) of Section Four (4), Township Forty-eight (48), Range Thirty-three (33), lying east of the east line of Brooklyn Avenue, and between the south line of Sixty-third Street and the north line of Sixty-fifth Street, all in Kansas City, Jackson County, Missouri,

be and the same is hereby canceled, set aside and for naught held.

3. That said above described properties, and each of them, be and the same are hereby discharged of and declared to be free of any and all liens of or on account of said tax bills and interest thereon, and also on account of said Ordinances No. 21831, and No. 24693, and all proceedings taken thereunder, and all assessments attempted to be levied or assessed against said real estate pursuant thereto.

4. That the complainants have and recover of and from the defendant, Fidelity National Bank and Trust Company, of Kansas City, a corporation, their costs herein expended.

To which finding, judgment and decree, and each and every part thereof, the defendants, and each of them, hereby except.

Dated July 7/21.

Arba S. Van Valkenburgh, District Judge.

[fol. 33] And afterwards, to-wit, on the 4th day of January, 1922, Petition for Appeal and Assignment of Errors were filed.

Also on the same date an Order Allowing Appeal was filed and entered of record.

Said Petition for Appeal, Assignment of Errors and Order Allowing Appeal are in words and figures as follows, to-wit:

[fol. 34] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
WESTERN DIVISION OF THE WESTERN DISTRICT OF  
MISSOURI

[Title omitted]

PETITION FOR APPEAL—Filed Jan. 4, 1922

To the Honorable Arba S. Van Valkenburgh, District Judge:

The above named defendants, McMillan Contracting Company, a corporation, and Fidelity National Bank and Trust Company of Kansas City, a corporation, feeling themselves aggrieved by the decree made and entered in this cause on July 7, 1921, do hereby appeal from said decree to the Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and they pray that their appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

And your petitioners further pray that the proper order be made touching the security to be required of them to perfect their appeal.

Bowersock & Fizzell, Justin D. Bowersock, Robert B. Fizzell,  
Attorneys for Defendants.

Allowed Jan'y 4/22. Arba S. Van Valkenburgh, Judge.

[fol. 35] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
WESTERN DIVISION OF THE WESTERN DISTRICT OF  
MISSOURI

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Jan. 4, 1922

Come now McMillan Contracting Company and Fidelity National Bank and Trust Company of Kansas City, defendants above named, and respectfully state that the order and decree made and entered in the above entitled cause on July 7, 1921, canceling the tax bills involved in this action, is erroneous and unjust to said defendants for the following reasons:

1. The court erred in not finding and holding that the provisions of Section 28 of Article 8 of the Charter of Kansas City, Missouri,



had been complied with in the matter of the suit required by that Section to be filed in the Circuit Court of Jackson County, Missouri, and in all other matters required by said Section.

2. The Court erred in not finding and holding that the judgment in the suit filed in the Circuit Court of Jackson County, Missouri under the provisions of said Section 28, was and is res adjudicata as to the propriety and reasonableness of the benefit district fixed by Ordinance Number 21831, as to the method of apportionment and as to all other matters that were or might have been litigated therein.

3. The court erred in ruling that the benefit district was arbitrary and unreasonable.

4. The court erred in ruling that the assessment was arbitrary and unreasonable.

5. The court erred in holding that the tax bills involved in this action exceeded the special benefits received by the lands in question.

6. The court erred in holding that the tax bills unreasonably exceeded the benefit or any possible benefit to the lands in question.

[fol. 36] 7. The court erred in holding that the improvement in question was in its nature a general public improvement, rather than a local improvement.

8. The court erred in holding that the method of apportionment within the benefit district was arbitrary and unreasonable.

9. The court erred in decreeing that the tax bills were null and void and that the land in question be released from said tax bills.

10. The court erred in making any finding as to the relation between the amounts of the tax bills in question and the values of the lands in controversy, for the reason that there was no competent evidence as to such values.

11. The court erred in holding the amounts of the tax bills in question to be unreasonable or confiscatory for the reason that there was no competent evidence as to the values of the lands in controversy.

12. The court erred in making any finding as to the extent of the special benefits received by the respective tracts, for the reason that there was no competent evidence as to such benefits, and erred in admitting any evidence on that issue.

13. The court erred in determining the validity of the tax bills in question upon the relation between the amount of each tax bill and the extent of the special benefit to the respective tract covered by such bill.

Wherefore, said defendants pray that said order and decree be reversed and that an order be entered denying the relief prayed for in the bill of complaint herein.

Bowersock & Fizzell, Justin D. Bowersock, Robert B. Fizzell,  
Attorneys for Defendants.

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[fol. 37] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
WESTERN DIVISION OF THE WESTERN DISTRICT OF  
MISSOURI

[Title omitted]

ORDER ALLOWING APPEAL—Filed Jan. 4, 1922

Now on this 4th day of January, 1922, there having been presented to me the petition of McMillan Contracting Company, a corporation, and Fidelity National Bank and Trust Company of Kansas City, a corporation, defendants herein, praying that they be allowed an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from an order and decree made and entered herein on July 7, 1921,

It is ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from said order and decree be and the same is hereby allowed, and that a certified copy of all records, proceedings and papers herein be forthwith transmitted to said United States Circuit Court of Appeals for the Eighth Circuit, upon said defendants giving bond conditioned as required by law, in the sum of Five hundred (\$500.00) Dollars.

Arba S. Van Valkenburgh, District Judge.

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[fol. 38] And afterwards, to-wit, on the 4th day of January, 1922, Election as to printing of record on appeal was filed.

Said Election as to printing is in words and figures as follows, to-wit:

[fol. 39] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
WESTERN DIVISION OF THE WESTERN DISTRICT OF  
MISSOURI

[Title omitted]

ELECTION TO HAVE RECORD PRINTED IN CIRCUIT COURT OF AP-  
PEALS—Filed Jan. 4, 1922

Come now McMillan Contracting Company, a corporation, and Fidelity National Bank and Trust Company of Kansas City, a corporation, defendants above named, by their attorneys, and hereby file their election to have printed under the supervision of the Clerk

of the United States Circuit Court of Appeals for the Eighth Circuit, the transcript of the record in the appeal of said McMillan Contracting Company and Fidelity National Bank and Trust Company of Kansas City from the order and decree of the District Court made and entered in the above-entitled cause on July 7, 1921.

Bowersock & Fizzell, Justin D. Bowersock, Robert B. Fizzell,  
Attorneys for Defendants.

[fol. 40] And afterwards, to-wit, on the 6th day of January, 1922, Bond for Appeal was filed and approved by the Court.

Said Bond for Appeal, together with the approval thereof, is in words and figures as follows, to-wit:

[fol. 41] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
WESTERN DIVISION OF THE WESTERN DISTRICT OF  
MISSOURI

[Title omitted]

BOND FOR APPEAL—Filed Jan. 6, 1922

Know all men by these presents that we Fidelity National Bank and Trust Company of Kansas City, a corporation, as principal, and Henry C. Flower, as surety, are held and firmly bound unto Walter L. Abernathy and Carrie S. Abernathy in the full and just sum of Five Hundred (\$500.00) Dollars, to be paid to the said Walter L. Abernathy and Carrie S. Abernathy, their heirs, legal representatives or assigns, to which payment well and truly to be made we bind ourselves, our heirs, legal representatives, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 4th day of January, 1922.

Whereas, lately at the April, 1921, term of the United States District Court of the Western Division of the Western District of Missouri, in a suit pending in said court wherein Walter L. Abernathy and Carrie S. Abernathy were complainants and McMillan Contracting Company, a corporation, and Fidelity National Bank and Trust Company of Kansas City, a corporation, were defendants, an order and decree was rendered against said defendants, cancelling and setting aside certain special tax bills therein described, and said [fol. 42] defendants McMillan Contracting Company, a corporation, and Fidelity National Bank and Trust Company of Kansas City, a corporation, have obtained an appeal and filed a copy thereof in the office of the Clerk of said Court to reverse the order and decree aforesaid, and a citation directed to said complainants, citing and admonishing them to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, sixty days from and after the day of said citation:

Now, the condition of this obligation is such that if said McMillan Contracting Company, a corporation, and Fidelity National Bank and Trust Company of Kansas City, a corporation, shall prosecute said appeal with effect and answer all damages and costs if they fail

to make good their appeal, then the above obligation to be void, otherwise to remain in full force and effect.

Fidelity National Bank and Trust Company of Kansas City, a Corporation, Principal, By J. M. Moore, President. Attest: A. H. Smith, Secretary, Cash. (Seal.) Henry C. Flower, Surety.

The above bond is hereby approved and ordered to be filed and made a part of the record in this cause, this 6th day of January, 1922.

Arba S. Van Valkenburgh, Judge.

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[fol. 43] And afterwards, to-wit, on the 13th day of February, 1922, Notice of lodging Condensed Statement of Evidence with the Clerk of the Court was filed.

Said Notice is in words and figures as follows, to-wit:

[fol. 44] IN THE UNITED STATES CIRCUIT COURT OF APPEALS,  
EIGHTH CIRCUIT

[Title omitted]

NOTICE—Filed Feb. 13, 1922

To the above named plaintiffs or to Warner, Dean, Langworthy, Thomas & Borders, their attorneys of record:

You are hereby notified that defendants have prepared and filed in the office of the Clerk of the above named court, a condensed statement of the testimony introduced at the trial of the above entitled cause, pursuant to Equity Rule 75-B, and that on Monday the 27th day of February, 1922, at 10 o'clock A. M. defendants will ask the judge of the above named court to approve said statement, and that on said day defendants will apply for an order making said statement a part of the record in this cause, for the purposes of the appeal from the judgment herein, to the United States Circuit Court of Appeals for the Eighth Circuit.

Bowersock & Fizzell, Miller, Camack, Winger & Reeder,  
Clarence S. Palmer, Attorneys for Defendants.

Received copy of the above and foregoing notice this 13th day of February, 1922.

Warner, Dean, Langworthy, Thomson & Borders, Attorneys  
for Plaintiffs.

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[fol. 45 & 46] And afterwards, to-wit, on the 13th day of February, 1922, the Condensed Statement of the Testimony introduced at the trial was filed.

Said Condensed Statement of Testimony is in words and figures as follows, to-wit:

[fol. 47] IN THE UNITED STATES CIRCUIT COURT OF APPEALS,  
EIGHTH CIRCUIT

[Title omitted]

Condensed Statement of Testimony—Filed Feb. 13, 1922

Prepared by Appellants in Accordance with Equity Rule No. 75-b

This suit was instituted on the 14th day of May, 1919, in the District Court of the United States for the Western Division of the Western District of Missouri, for the cancellation of certain special tax bills issued by Kansas City, Missouri.

Thereafter at the November 1920 term of said court and on the 28th day of January, 1921, at 10:00 o'clock a. m., the above entitled cause came on for hearing before the Honorable Arba S. Van Valkenburgh, Judge of said Court, and was tried in conjunction with two other cases brought for the cancellation of similar special tax bills, to-wit: Felix H. Swope and Gertrude M. Brown v. Fidelity National Bank and Trust Company, Standard Investment Company, Silas C. De Lap, Hunter M. Meriwether and Gilmer Meriwether, Number 215; and Walter L. Abernathy and Carrie S. Abernathy v. McMillan Contracting Company and Fidelity National Bank and Trust Company, Number 163. All parties agreed that the three cases should be tried together and that the evidence offered should bear upon the issues of each case, so far as applicable.

The plaintiff in the above entitled cause was represented by A. S. Marley, his counsel. In the case of Felix H. Swope, et al. v. Fidelity National Bank and Trust Company, et al., plaintiffs were [fol. 48] represented by Elliott H. Jones, of Scaritt, Jones, Seddon & North, their counsel. In the case of Walter L. Abernathy, et al. v. McMillan Contracting Company, et al., Messrs. O. H. Dean, H. M. Langworthy, and Roy Thomson of Warner, Dean, Langworthy, Thomson & Williams, represented the plaintiffs. Messrs. Justin D. Bowersock, Robert B. Fizzell and Guy Vernon Head, of Bowersock & Fizzell, and Messrs. Maurice H. Winger and Frank P. Barker, of Miller, Camack, Winger & Reeder, and Clarence S. Palmer, represented the defendants in all three cases.

Thereupon the following proceedings were had:

Plaintiff to sustain the issues on his part offered and introduced evidence, oral and documentary, as follows:

Section 28 of Article 8 of the Charter of Kansas City, Missouri, was introduced in evidence by the complainant, and is set forth here in full as follows:

[fol. 49] EXHIBIT IN EVIDENCE

Section 28. Grading, etc.—When Too Heavy Burden on Benefit District, as Limited in Section 3 of This Article—Benefit Limits May Be Determined by Ordinance.—When in grading or regrading any street, avenue, highway, or part thereof, a very large or un-

usual amount of filling in or cutting or grading away of earth or rock be necessary, necessitating an expense of such magnitude as to impose too heavy a burden on the land situate in the benefit district as limited in Section three of this article, and when in grading or regrading, constructing or reconstructing any street, avenue, highway or part thereof, one or more bridges, viaducts, tunnels, subways, cuts or approaches on, along, over or under the same is or are required or needed, the cost of grading or regrading such street, avenue, highway, or part thereof, including the cost of constructing or reconstructing such bridges, viaducts, tunnels, subways and approaches, or any of them, may be charged as a special tax on parcels of land (exclusive of improvements) benefited thereby, after deducting the portion of the whole cost, if any, which the city may pay, and in proportion to the benefits accruing to the said several parcels of land, exclusive of improvements thereon, and not exceeding the amount of said benefit, said benefits to be determined by the Board of Public Works as hereinafter provided, and the limits within which parcels of land are benefited shall in all such specified instances be prescribed and determined by ordinance. If the Common Council shall find and declare in the ordinance providing for the doing of the work above described that a very large or unusual amount of filling in or cutting or grading away of earth or rock is necessary, necessitating an expense of such magnitude as to impose too heavy a burden on the land situate in the benefit district as limited in Section three of this article, or that in grading or regrading, constructing or reconstructing any street, avenue, highway, or part thereof, one or more bridges, viaducts, tunnels, subways, cuts or approaches on, along, over or under the same is, or are required or needed, the finding and declaration in said ordinance shall be final and conclusive as to all such matters.

**Public Works Shall be Provided for by Ordinance—Proceedings in Circuit Court Against Owners—Petition to Contain, What.—**The Public Work described above shall be provided for by ordinance, and the city may provide that after the passage of the ordinance and after an approximate estimate of the cost of the work shall have been made by the Board of Public Works, the city shall file a proceeding in the Circuit Court of Jackson County, Missouri, in the name of the city, against the respective owners of land chargeable under the provisions of this section with the cost of such work. In such proceeding the city shall allege the passage and approval of the ordinance providing for the work, and the approximate estimate of the cost of said work; and shall define and set forth the limits of the benefit district, prescribed by the ordinance, within which it is proposed to assess property for the payment of said work. The prayer of the petition shall be that the court find and determine the validity of said ordinance, and the question of whether or not the respective tracts of land within said benefit district shall be charged with the lien of said work in the manner provided by said ordinance.

**Process—What Parties May Offer in Evidence.—**Service of process in such proceeding shall be governed by the provisions of Section

eleven (11) of Article thirteen (XIII) of this Charter, relating to service of notice and summons in proceedings for the ascertainment of benefits and damages for the condemnation of lands for parks and boulevards. In such proceedings, the city shall have the right to offer evidence tending to prove the validity of said ordinance, and said proposed lien against the respective lots, tracts and parcels [fol. 51] of land within said benefit district sought to be charged with such lien; and the respective owners of lots, tracts and parcels of land within said benefit district shall have the right to introduce evidence tending to show the invalidity or lack of legality of said ordinance, and said proposed lien against the respective lots, tracts, and parcels of land owned by each respective defendant; and the court shall have the right to determine the question of whether or not the said lots, tracts and parcels of land owned by each defendant should be charged with such lien.

**Trial—Judgment.**—The trial of such proceedings shall be in accordance with the Constitution and Laws of the State, and the court shall render judgment either validating such ordinance, and proposed lien against the lots, tracts and parcels of land within said benefit district or against such lots, tracts, or parcels of land within said benefit district or against such lots, tracts, or parcels of land as the court may find legally chargeable with the same, or the court may render judgment that such ordinance or proposed lien are, in whole or in part, invalid and illegal.

**Appeal—What Court Shall Determine.**—Any appeal taken from such judgment must be taken within ten days after the rendition of such judgment, or if a motion for a new trial be filed therein, then within ten days after such motion may be overruled or otherwise disposed of; but in all other respects the rules covering such appeal shall be the same as provided by Section eighteen (18) of Article thirteen (XIII) of this Charter.

**No Appeal, or After Determination of, City May Enter Into Contract, etc.**—If no appeal shall be taken, or after the determination of such appeal, the city may enter into a contract with the successful bidder to whom such work may be let; and, after the work under such contract shall have been fully completed, the estimate of cost thereof, and the apportionment of the same against the various lots, tracts and parcels of land within the benefit district, shall be [fol. 52] made by the Board of Public Works according to the assessed value thereof, exclusive of improvements, with the assistance of the City Assessor as provided in Section three of this article, and all of the provisions of Section three of this article relating to the apportionment of special assessments, and the levy, issue and collection of special tax bills as in grading proceedings as in said section specified, shall apply to special tax bills issued pursuant to this section, except that said tax bills may be made payable in not to exceed ten annual installments; the number of installments, and the times when payable to be determined by the Common Council on the recommendation of the Board of Public Works, such determination to be determined in the ordinance of the Common Council in which said work is authorized and the proceedings thereof instituted.



**Meaning and Intent of This Section.**—Nothing in this section stated shall in anywise affect, modify or change the provisions of the previous sections of this article, or in any manner affect or change the proceedings and remedies therein set forth for the doing of public work and the payment therefor by the issue of special tax bills; the intention of this section being to provide an independent and separate method of public improvements made under the provisions of this section.

[fol. 53] Section 3 of Article VIII of the Charter of Kansas City, Missouri, which is referred to in Section 28 of Article VIII, supra, was also offered in evidence, and is in words and figures as follows:

[fol. 54]

#### EXHIBIT IN EVIDENCE

**Section 3. Improvements and Repairs—Resolution of Board of Public Works—What it Shall State.**—All proceedings to improve streets, avenues, alleys, sidewalks and public highways of every character, and parts thereof, within the city, by grading, re-grading the same, paving or re-paving the same, with any material, macadamizing or re-macadamizing or oiling the same, constructing or reconstructing the same, curbing or re-curbings the same, guttering or re-guttering the same, or repairing the same, constructing bridges, viaducts, tunnels, subways or cuts along or under the same and the maintenance and repair of any or all of such improvements during a stated term of years, and by sodding, re-sodding and the planting or re-planting of trees and maintaining them for a term of years along the same, or along any part thereof, excepting boulevards under park commissioners, or a proceeding for constructing or reconstructing public, district or joint district sewers, shall be begun by the adoption of a resolution by the Board of Public Works, which resolution shall state the nature of the improvement and when the same is to be paid for in whole or in part in special tax bills, the method of making assessments to pay therefor.

**Hearing, Notice of.**—After the adoption of any such resolution the Board of Public Works shall, by order, fix a day upon which a hearing in respect to such improvement shall be had, which day shall be within thirty days after the date when such order is made, and shall cause to be published for ten days in the newspaper at the time doing the city printing, and if there is no such paper, then in any other newspaper published in the city, a notice directed to the property owners interested in the improvement without naming them, which notice shall recite the substance of the resolution and that a hearing will be had by the said board at their office concerning the [fol. 55] proposed improvement, and the date upon which the hearing shall be had.

**Property Owners to Present Views—Paving.**—On the date fixed for such hearing any and all property owners interested in such improvement may, by written petition, or otherwise, present their



views in respect to the proposed improvement to the said board, and the said board may adjourn the hearing from time to time. After such hearing, if the said board shall determine that it is not for the public interest that the proposed improvement, or a part thereof, be made and paid for, either out of the general fund or by any method of assessment, they shall make an order to that effect, and thereupon the proceedings for the improvement, or part thereof determined against by such order, shall stop and shall not be begun again until the adoption of a new resolution.

**Remonstrance.**—In case the improvement or part thereof consists of paving or re-paving, macadamizing or re-macadamizing the roadway of a street, avenue, alley or part thereof, which shall not have been found and declared to be used and occupied for business purposes, as hereinafter specified, and the resident owners of the city owning a majority of the front feet of all the lands belonging to such residents and fronting on the street, avenue, alley or part thereof to be paved or macadamized, shall file with the said board, on or before the day fixed for such hearing, a remonstrance against such paving or macadamizing, the power of the board to make the improvement shall cease for the period of six months from the date of filing of such remonstrance, after the lapse of which period the proceeding may be begun by the adoption of a new resolution.

**Finding and Declarations of Common Council, Effect of.**—In case the proposed improvement consists of paving or re-paving, macadamizing or re-macadamizing as aforesaid, then, in that event, upon the unanimous recommendation of the Board of Public Works, if each house of the Common Council shall, by ordinance, find and declare a vote of two-thirds of the members-elect of each house that [fol. 56] the street, avenue, alley, public highway, or part thereof, on which the proposed improvement is to be made is used or occupied for business purposes, and that the improvement has been unanimously recommended by the Board of Public Works, such finding and declaration shall be final and conclusive for all purposes, and no special tax bills that may be issued to pay for the work shall be held invalid or affected for the reason that the work for which they may have been issued was not unanimously recommended by the Board of Public Works, or that such street, avenue, alley, public highway or part thereof was not in fact used or occupied for business purposes, and the improvement shall proceed regardless of any remonstrance.

**Improvements Arrested, Proceedings.**—After the expiration of the respective periods during which an improvement may be arrested, as aforesaid, a proceeding may be begun and carried forward for the improvement so determined against or remonstrated against as though no former proceedings had been begun. If no such determination against the improvement is made, or if only a part of the proposed improvement be determined against by said board, the said board shall adopt and perfect plans and specifications for the proposed improvement not determined against, and for an improvement of the same general nature, including, as they deem proper, provisions for the maintenance thereof for a stated period, and in

case a macadam or gravel street roadway pavement is provided for, there may be included as an essential part of maintenance thereof specifications for the rolling and oiling of such pavement at intervals during a stated period.

**Advertising for Bids—Contract Confirmed by Ordinance.**—After the passing of such resolution and the adoption of such plans and specifications, the Board of Public Works shall advertise for bids for the doing of the work by publication for not less than five days, and shall let the contract to the lowest and best bidder therefor, and [fol. 57] shall cause the contract so let to be formally executed by the contractor and by said board on behalf of the city, and the same, before it shall be binding and effective, shall be ratified, approved and confirmed by an ordinance of the said city, as hereinafter specified, and when so ratified, approved and confirmed shall in all respects be considered and held to have been authorized by the city.

**Board May Rescind Before Confirmation of Contract—Completion of Work—Time Extended.**—The Board of Public Works, at any time before any contract is so ratified, approved and confirmed, may rescind by an order entered on the records of said board, the action of said board in signing said contract in behalf of the city, and thereupon all proceedings had in relation to such proposed improvement shall be null and void. The city shall have power, by ordinance, for any good cause, to extend the time of the beginning or of the completion of the work under any such contract, and an ordinance of the city purporting to extend the time therefor shall be conclusive evidence of the existence of good cause for extension. But all such ordinances for extensions must have endorsed thereon the approval of the Board of Public Works; and said board shall not endorse said approval until the City Engineer shall file with said board his verified certificate stating the reasons for granting such extension, and that said extension is made in good faith for the reason therein specified, and for none other.

**When Cost Paid by Special Tax Bills.**—The ordinance ratifying, approving and confirming the contract as above provided for shall also provide for and authorize the improvement, and shall state the nature of the improvement, and this may be done by a reference to the plans and specifications therefor, and such ordinance shall state how the cost thereof shall be paid; that is, whether the cost thereof is to be paid by the issuance of special tax bills, or out of [fol. 58] the general fund, or whether by one method or the other, in whole or in part, and if by the issuance of special tax bills, how the assessments therefor shall be made and levied. The said board shall endorse their approval on the ordinance. The Common Council may amend such ordinance by altering the limits of a proposed benefit district in all cases where the dimensions and boundaries of such district are not specifically defined by this Charter but may not make any other amendment, and shall pass or reject the same.

**Assessment, how Made.**—When the cost of the whole or any part of the improvement referred to in this section is to be paid by special tax bills evidencing assessments against lands, such assessments shall be made, levied and assessed according to one of the methods in this

Article prescribed. Such method shall be specified in the resolution of the Board of Public Works and also in the ordinance confirming the contract for doing the work. In making assessments to pay for work other than for grading or re-grading, and other than for constructing district sewers and joint district sewers, the Board of Public Works shall compute the cost thereof and apportion the same among the several tracts or parcels of land to be charged therewith, and charge each lot or parcel of land with its proper share of such cost according to the frontage of such land on the street, avenue, alley or highway, or part thereof, named in the contract for the doing of the work. In making assessments for special tax bills to pay for grading or re-grading any street, sidewalk, avenue or public highway, or part thereof, the City Assessor shall, on demand of the Board of Public Works, cause an assessment to be made of the value of all the lands to be charged with the cost of such grading or re-grading, exclusive of the improvements thereon, and shall deliver such assessment to the Board of Public Works, who shall compute the cost of such grading or regrading and apportion such cost among [fol. 59] the several lots or parcels of land to be charged, according to the value thereof, fixed by the City Assessor as aforesaid, and charge each lot or parcel of land with its proper share of such cost.

Grading Cost, How Apportioned.—When the work of grading or re-grading streets, avenues or public highways is to be paid for in special tax bills, the cost shall be apportioned and paid as follows: The cost of all grading, including the grading of sidewalks, shall be charged as a special tax on all lands on both sides of the street, avenue or public highway, or part thereof, graded within the following limits, viz: In case the land fronting on the street, avenue or public highway, or part thereof, graded, be laid off in lots or blocks, property so laid off from the line of the street, avenue or public highway, or part thereof, graded, back to the center line of the block or blocks, shall be so charged, whether fronting on the street, avenue or public highway or not; nevertheless, the Common Council shall have power by ordinance to prescribe that such lands shall not be charged beyond the alleys in such blocks, if deemed just and equitable, and in case any land fronting on such street, avenue or public highway, or part thereof, graded, be not laid off into lots or blocks, then the land not so laid off, and the land in the rear thereof on the line of the street, avenue or public highway, or part thereof, graded, back one hundred and fifty feet, shall be so charged, whether fronting on the street or not; and land liable for such grading shall be charged according to the value thereof, exclusive of improvements thereon, as herein provided; and in case of question on the part of the assessor or Board of Public Works as to whether any lands fronting on the street, avenue or public highway, or part thereof, be laid off into lots or blocks, or not, within the meaning of this section, the common council shall, on the request of the assessor or Board of Public Works, in making out special tax bills and charging the lands for such grading, determine whether or not, any particular land or lands fronting on the [fol. 60] street, avenue, public highway, or part thereof, graded to

be laid off or not into lots or blocks within the meaning of this section, and such determination shall be conclusive on all parties interested for all purposes. The cost of all work on any sidewalk, including curbing and guttering along the side thereof, exclusive of the grading of the same, shall be charged as a special tax upon the adjoining lands according to the frontage thereof on the sidewalk. The cost of all work mentioned in this section of this article done on spaces fronting on any other street, avenue, alley or public highway, shall be deemed part of the costs of work done on other spaces under the same ordinance and contract, and be charged and paid for accordingly.

**Tax Bills Against Corner Lots—Contracts for Different Kinds of Work.**—In making out special tax bills against corner lots for work on sidewalks, other than grading, and for work of curbing, they shall be charged for work on both fronts and on the outside corners. A single contract may be let and entered into to do various kinds of work when payment is to be made therefor in special tax bills, and when any kind of work shall be fully completed, tax bills therefor may be issued; but in case of a general contract for repairs, as provided in Section 16 of this Article, tax bills may be issued from time to time as separate jobs of repairing may be done.

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[fol. 61] B. W. GANTT, being duly sworn testified: That he was deputy City Clerk of Kansas City, Missouri and as such identified Ordinance of Kansas City, Missouri, No. 21831, the original of which ordinance was marked as Plaintiffs' Exhibit 1 and introduced in evidence.

Said Plaintiffs' Exhibit 1 is substantially as follows:

PLAINTIFFS' EXHIBIT NO. 1 TO GANTT'S TESTIMONY

[fol. 62]

Ordinance No. 21831

An Ordinance to Grade Meyer Boulevard from the West Line of Swope Parkway to the East Line of the Paseo and to Condemn Easements to Support Embankments or Fills, Describing the Nature of the Improvement, Providing How the Cost Thereof Shall be Paid, and Prescribing the Limits Within Which Private Property is Deemed Benefited by the Proposed Improvement, and Assessed and Charged to Pay Damages Caused by said Grading, and by the Condemnation of said Easements, and Assessed and Charged to Pay the Cost of said Improvement.

Whereas, The Board of Park Commissioners has, by Resolution No. 1762, adopted on the 11th day of December, 1914, recommended to the Common Council of Kansas City that Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, be graded to the full width thereof, and to the established grade of the

same, and that easements to support embankments or fills be condemned, and

Whereas, The Board of Public Works, by its Resolution under Entry No. 73992, on the 11th day of December, 1914, has joined in said recommendation, Now, Therefore,

Be it ordained by the Common Council of Kansas City:

Section 1. That the Boulevard or highway known and designated as Meyer Boulevard from the West line of Swope Parkway to the east line of The Paseo, be graded to the full width thereof and to the established grade of the same.

Section 2. That as the proposed grading of said Meyer Boulevard, or part thereof, to the established grade for the full width thereof will cause certain embankments or fills to be made leaving abutting property below the proposed grade of said boulevard or highway, there is hereby condemned in said abutting property easements or right to support said embankments or fills so far as may be necessary to bring the said boulevard or highway to the required grade, and by allowing the material of which said embankments are made to fall upon the abutting land at the natural slope so that the surface of the boulevard or highway may be graded to the full width thereof. The areas of land in which said easements are condemned are shown in the plat forming part of the plans hereinafter referred to in Section 3 hereof, prepared and on file in the office of the Board of Park Commissioners, showing a profile of the portion of said Boulevard or highway proposed to be graded and indicating thereon approximately the amount of the encroachment of the embankment upon the abutting property, which said plat is hereby referred to and identified. Just compensation for the easements herein condemned shall be assessed, collected and paid according to law.

Section 3. Said work and improvements shall be of the nature described and specified in, and shall be in accordance with, the plans and specifications, adopted, perfected and approved by the Board of Public Works, on the 11th day of December, 1914, by Resolution under its entry Number 73991, and by the Board of Park Commissioners of Kansas City, Missouri, on the 11th day of December, 1914, under Resolution No. 1761, which said plans and specifications are now on file in the office of said Board of Park Commissioners. Said improvement is hereby provided for and authorized.

[fol. 63] Section 4. Whereas, private property may be disturbed or damaged by the grading herein provided for and authorized and by the condemnation of the easements herein provided for, and the owners thereof lawfully entitled to remuneration or damages under the constitution of this state have not waived all right or claim thereto, it is ordered that proceedings to ascertain and assess all such damages or remuneration be begun and carried on as provided by Article VII of the Charter of said City; and the Common Council prescribes and determines the limits within which private property is deemed benefited by the proposed grading and improve-

ment herein provided, and within which said property may be assessed or charged to pay such remuneration or damages, including the taking and damaging of private property for public use for or in the acquiring of said easements, to be as follows, to-wit:

(Here follows designation of the limits of the benefit district as shown in Plaintiff's Exhibit No. 12.)

Section 5. The Common Council hereby finds and declares that in the grading of said boulevard or highway a very large or unusual amount of filling in, or cutting or grading away of earth or rock is necessary, necessitating an expense of such magnitude as to impose too heavy a burden on the land situate in the benefit district as limited in Section 3 of Article VIII of the Charter of Kansas City.

Section 6. The cost of grading said boulevard or highway as provided herein, shall be charged as a special tax on parcels of land (exclusive of improvements) benefited thereby after deducting the portion of the whole cost, if any, which the city may pay, and in proportion to the benefits accruing to the said several parcels of land, exclusive of improvements thereon, and not exceeding the amount of said benefits, said benefits to be determined by the Board of Public Works and after said work shall have been fully completed, the cost thereof shall be estimated by the said Board of Public Works and shall be apportioned by said Board of Public Works against the various lots, tracts and parcels of land within the benefit district, according to the assessed value thereof, exclusive of improvements, as provided in Section 28, of Article VIII of the Charter of Kansas City aforesaid; and the limits within which parcels of land are benefited as aforesaid, and within which it is proposed to assess property for the payment of said work and improvement, are hereby prescribed and determined to be the same limits as are hereinbefore, in Section 4 of this Ordinance, prescribed and determined as the limits within which private property is deemed benefited by the proposed grading of said boulevard or highway, all in pursuance of Section 28 of Article VIII of the Charter of Kansas City, aforesaid.

Section 7. Payment of the cost of all of said work shall be made in Special Tax Bills evidencing special assessments made and levied against each lot or parcel of land chargeable therewith respectively, and set forth in Section 6 of this Ordinance. Said Tax Bills shall be payable in ten (10) annual installments according to law, the first of said installments to become due and collectible as provided in Section 25 of Article VII of the Charter of Kansas City aforesaid, in the case of Tax Bills payable in installments, and the remaining installments shall be due and collectible, one each year thereafter, on the 30th day of June of each year until all said installments are paid.

[fol. 64] The Common Council hereby finds and declares that its action herein has been recommended by the Board of Public Works and also by the Board of Park Commissioners.

The improvement provided for herein the Common Council deems necessary to have done, but the passage of this Ordinance and the



doing of such work shall not render Kansas City liable to pay for such work, or any part thereof, otherwise than by the issue of Special Tax Bills, and except as herein provided.

Section 8. The Board of Public Works shall make an approximate estimate of the cost of the work herein provided for, and after the passage of this Ordinance, and after such approximate estimate of the cost of said work shall have been made by said Board, a proceeding separate from the proceeding provided for in Section 4 of this Ordinance, shall be filed in the Circuit Court of Jackson County, Missouri, in the name of the City, against the respective owners of land chargeable under the provisions of Section 28 of Article VIII of the Charter of Kansas City aforesaid, with the cost of said work, for the purpose, and in the manner prescribed in said Section 28 of Article VIII of the Charter of Kansas City, Missouri, and as provided in this Ordinance.

Section 9. The Common Council hereby finds and declares that its action herein has been recommended by the Board of Park Commissioners of Kansas City, Missouri, and by the Board of Public Works, and that the said Boards have recommended to the Common Council that the above mentioned boulevard or highway be graded to the full width thereof as herein provided for and that easements to support embankments or fills be condemned as herein provided for and that payment for all said work be made in Special Tax Bills as herein provided for; and the action of said Board of Park Commissioners and the Board of Public Works in determining that said work shall be done and that the payment for same be made in special tax bills is hereby ratified and confirmed.

Section 10. All Ordinances, or parts of Ordinances in conflict with this Ordinance, are, insofar as they conflict with this ordinance, hereby repealed.

[fol. 64a] Mr. Gantt also identified Resolution of the Board of Park Commissioners of Kansas City, Missouri No. 1762, and the original of said Resolution was offered in evidence as Plaintiffs' Exhibit 2.

Said Plaintiffs' Exhibit 2 is substantially as follows:

PLAINTIFFS' EXHIBIT NO. 2 TO GANTTS' TESTIMONY

[fol. 65]

Resolution No. 1762

A Resolution to Grade Meyer Boulevard from the West Line of Swope Parkway to the East Line of the Paseo and Recommending the Condemnation of Easements to Support Embankments or Fills, Describing the Nature of the Improvement, and Providing How the Cost Thereof Shall Be Paid

Be it resolved by the Board of Park Commissioners of Kansas City, Missouri:



Section 1. That Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, be graded to the full width thereof and to the established grade of the same. Said work and improvement to conform in all respects to plans and specifications for said work adopted, perfected and approved on the 11th day of December 1914, by the Board of Public Works under its entry Number 73991, and by the Board of Park Commissioners on the 11th day of December 1914, under Resolution No. 1761, which said plans and specifications show the location and description of the proposed public improvement as a whole, and are now on file in the office of said Board of Park Commissioners.

Section 2. That as the proposed grading of said Meyer Boulevard, or part thereof, to the established grade for the full width thereof will cause certain embankments or fills to be made, leaving abutting property below the proposed grade of said boulevard or highway, the Common Council is hereby recommended to condemn in said abutting property, easements or right to support said embankments or fills so far as may be necessary to bring the same boulevard or highway to the required grade and by allowing the material of which said embankments are made to fall upon the abutting property at the natural slope so that the surface of the boulevard or highway may be graded to the full width thereof. The areas of land in which said easements are condemned, are shown in the plat forming part of the plans heretofore referred to in Section 1 hereof, prepared and on file in the office of this Board, showing a profile of the portion [fol. 66] of said Boulevard or highway proposed to be graded and indicating thereon approximately the amount of encroachment of the embankments upon the abutting property. Just compensation for the easements herein recommended to be condemned to be assessed, collected and paid according to law.

Section 3. Payment of the cost of all of said work shall be made in special tax bills evidencing special assessments made and levied against each lot or parcel of land chargeable therewith, respectively, according to law, and inasmuch as in the grading of said boulevard or highway a very large or unusual amount of filling in, or cutting, or grading away of earth or rock is necessary, necessitating an expense of such magnitude as to impose too heavy a burden on the lands situate in the benefit district as limited in Section 3 of Article VIII of the Charter of Kansas City, Missouri, the Board of Park Commissioners recommends to the Common Council that a special benefit district, within which benefit district private property may be assessed for the payment of said work and improvement, be prescribed, determined and established, all as provided by Section 28 of Article VIII of the Charter of Kansas City; and that said tax bills shall be payable in ten (10) annual installments according to law, the first of said installments to become due and collectible as provided in Section 25 of Article VIII of the Charter of Kansas City, in the case of tax bills payable in installments, and that the remaining installments shall be due and collectible, one each year thereafter, on the

30th day of June of each year until all said installments are paid, all as provided in the Charter of Kansas City.

Section 4. The Board of Park Commissioners of Kansas City, Missouri, does hereby recommend to the Common Council of said city to provide for ordinance for the doing of said work, and for the condemning of easements to support embankments or fills and that payment of the whole thereof be made in special tax bills and that the Common Council by ordinance order said work to be done.

[fol. 67] Section 5. That a verified copy of this resolution be delivered to each house of the Common Council as notice to said Common Council of the action and recommendation of this Board.

In testimony whereof, I T. C. Harrington, Secretary of the Board of Park Commissioners of Kansas City, Missouri, have hereunto set my hand and affixed the seal of said Board this 11th day of December 1914.

T. C. Harrington, Secretary of the Board of Park Commissioners of Kansas City, Missouri. (Seal.)

I, E. J. McDonnell, Secretary of the Board of Public Works of Kansas City, Missouri, do hereby certify that said Board of Public Works at a regular meeting thereof held on the 11th day of December 1914, by resolution recorded under its Entry No. 73992 did adopt the foregoing resolution of said Board of Public Works; and that the President and Secretary of said Board of Public Works were duly authorized and instructed to attach the approval of said Board of Public Works to a copy of said resolution.

E. J. McDonnell, Secretary of the Board of Public Works of Kansas City, Missouri. R. L. Gregory, President of the Board of Public Works of Kansas City, Missouri. (Seal.) 73992.

STATE OF MISSOURI,  
County of Jackson,  
Kansas City, ss:

I, J. A. Bermingham, City Clerk of Kansas City, Missouri, hereby certify that the annexed and foregoing is a true and correct copy of a Resolution No. 1762, adopted by the Board of Park Commissioners on the 11th day of December 1914, and by the Board of Public Works on the 11th day of December 1914, as the same appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of Kansas City aforesaid, this 17th day of February A. D. 1920.

J. A. Bermingham, City Clerk. (Seal.)

[fol. 68] Mr. Gantt also identified Ordinance of Kansas City, Missouri, No. 9525, and the original of said ordinance was admitted in evidence by the court over the objections of the Defendants made

at the time as to the relevancy of said ordinance, as Plaintiffs' Exhibit 3.

The material portions of said Ordinance are as follows:

PLAINTIFFS' EXHIBIT NO. 3 TO GANTTS' TESTIMONY

[fol. 69]

Ordinance No. 9525

An Ordinance to Open and Establish a Public Parkway Along Flora, Lydia and Woodland Avenues, 64th Street, and Other Lands in the Westport, Southwest, and Swope Park Districts in Kansas City, Missouri

Whereas, The Board of Park Commissioners of Kansas City, Missouri, has selected and designated certain lands hereinafter described, to be acquired and used for parkway purposes and has recommended to the Common Council of Kansas City, Missouri, the acquisition and establishment of the same as and for a public parkway, accordingly to law, therefore,

Be it ordained by the Common Council of Kansas City:

Section 1. That a public parkway, be, and the same is hereby opened and established along Flora, Lydia and Woodland Avenues, 64th Street and other lands in the Westport, Southwest and Swope Park Districts of Kansas City, Jackson County, Missouri, comprising and including the following described lands situated in Kansas City aforesaid, to wit:

(Here follows description of land taken.)

Section 2. The private property to be taken as aforesaid, shall be paid for by special assessments upon real estate and just compensation therefor shall be assessed, collected and paid as provided in Article XIII of the Charter of Kansas City, Missouri, as existing and now in force.

The Special assessments to be made in payment for the private property taken or damaged in pursuance hereof, shall be paid in twenty (20) equal annual installments, such installments to be payable at such time, in such manner and with such interest as is provided in Section Twenty-one (21) of Article XIII of the Charter of Kansas City, Missouri, for the payment of installments of assessments made payable in more than one installment.

[fol. 70] Section 3. The Common Council determines and prescribes the limits within which private property shall be deemed benefited by the improvement herein proposed and be assessed and charged to pay compensation therefor as follows, to-wit:

(Here follows description of benefit district as shown on plaintiffs' Exhibit #13.)

Section 4. The Common Council finds and declares that the action of the Common Council herein has been recommended by the Board of Park Commissioners of Kansas City, Missouri, as pro-

vided by law, and that said Board of Park Commissioners has selected and designated the land described in Section One of This Ordinance to be acquired and used for parkway purposes and has recommended to said Common Council the acquisition and establishment of the same as and for a public parkway, and has further recommended that if the Common Council should determine that said lands to be acquired as aforesaid, should be paid for by special assessments upon real estate, said assessments shall be made payable in twenty (20) equal annual installments, as provided in Section Two of this ordinance.

Section 5. That ordinance No. 4472 approved March 30th, 1910, and all ordinances or parts of ordinances in conflict herewith, are, insomuch as they conflict with this ordinance hereby repealed.

Passed Jul. 31, 1911. Frank D. Askew, Speaker Lower House of the Common Council.

Passed Aug. 7, 1911. R. L. Gregory, President, Upper House of the Common Council.

Approved Aug. 9, 1911. Darius A. Brown, Mayor.

Attest: Wm. Clough, City Clerk. (Seal.)

[fol. 71] Mr. Gantt also identified Resolution of the Board of Park Commissioners of Kansas City, Missouri, No. 10363, the original of which resolution was admitted in evidence by the court over the objections of the Defendants made at the time as to the relevancy of said resolution as Plaintiffs' Exhibit 4.

The material portions of said exhibit are as follows:

[fol. 72] PLAINTIFFS' EXHIBIT NUMBER 41 TO GANTT'S TESTIMONY

#### Resolution No. 10363

A Resolution Selecting and Designating Certain Land in the Westport, Southwest, and Swope Park Districts in Kansas City, Missouri, for Parkway Purposes

Be it resolved by the Board of Park Commissioners of Kansas City, Missouri:

Section 1. That the following described land situated within the Westport, Southwest and Swope Park Districts of Kansas City, Jackson County, Missouri, be and the same is hereby selected and designated as and for a public parkway, under and in pursuance of Article Thirteen (XIII) of the charter of Kansas City, Missouri, said land being described by metes and bounds as follows, to wit:

(Here follows same description of land as set out in Ordinance Number 9525.)

The Board of Park Commissioners does hereby recommend to the Common Council of Kansas City, Missouri, the establishment of a public parkway to include all the land within the above described

metes and bounds, excepting the use and easement for a double track street railway of the track, or tracts, now occupied and used by the Metropolitan Street Railway Company, The Interurban South Side Railway, a corporation, and the old Kansas City Memphis and Mobile Railroad Company, now known as the Kansas City and Westport Belt Railway Company, their successors and assigns, within the boundary lines above described.

That all private property within said metes and bounds, as above stated and specified and herein before described, saving only the exceptions hereinbefore specified and excluded, be acquired for parkway purposes by purchase, condemnation or otherwise as said Common Council may deem best.

[fol. 73] Section 2. In case that the Common Council determines that said land — be acquired as aforesaid, shall be paid for by special assessments upon real estate, the Board of Park Commissioners hereby recommends that said assessments shall be made payable in twenty (20) equal annual installments, to be payable at such times, in such manner and with such interest as provided in Section Twenty-one (21) of Article Thirteen (XIII) of the Charter of Kansas City, Missouri, for the payment of installments of assessments made payable in more than one (1) installment.

Section 3. That resolution No. 9154 adopted March Twenty-eighth (28th) 1910, and all resolutions, or parts of resolutions, in conflict with this resolution, insofar as they conflict, are hereby rescinded.

Section 4. That a certified copy of this resolution be delivered to each house of the Common Council of Kansas City, Missouri, as notice to said Common Council of the action and recommendations of this Board.

#### Office of the Board of Park Commissioners

#### Kansas City, Missouri

I, Frank P. Gossard, Secretary of the Board of Park Commissioners, of Kansas City, Missouri, do hereby certify that the above and foregoing is a true and perfect copy of a certain resolution of said Board, known and designated as "Resolution No. 10363," as the same appears of record in the office of said Board and that said resolution was adopted by said Board of Park Commissioners at a regular meeting thereof held on the 10th day of July, 1911.

In testimony whereof, I, Frank P. Gossard, Secretary of the Board of Park Commissioners of Kansas City, Missouri, have hereunto set my hand and affixed the seal of said Board this 15th day of July, A. D. 1911.

Frank P. Gossard, Secretary of the Board of Park Commissioners of Kansas City, Missouri.

[fol. 74] Mr. Gantt also identified Ordinance of Kansas City, Missouri, No. 16850, the original of which ordinance was admitted

by the court in evidence over the objections of the defendants made at the time as to the relevancy of said ordinance, as Plaintiffs' Exhibit 5.

Said Exhibit 5 is substantially as follows:

[fol. 75] PLAINTIFFS' EXHIBIT NUMBER 5 TO GANTT'S TESTIMONY

Ordinance No. 16850

An Ordinance to Name the Parkway in the Westport, Southwest, and Swope Park Districts, Heretofore Opened and Established by Ordinance No. 9525, Approved August 9, 1911

Whereas, the Board of Park Commissioners of Kansas City, Missouri, has by resolution named a parkway in the Westport, Southwest and Swope Park Districts in Kansas City, Missouri, opened and established under Ordinance No. 9525, approved August 9, 1911, and has recommended to the Common Council to concur therein by Ordinance, and

Whereas, it is necessary for the convenience of improving the parkway, and house numbering, on said parkway to establish a name or names for said parkway, therefore,

Be it ordained by the Common Council of Kansas City:

Section 1. \* \* \*

That all that portion of the Parkway (along 64th Street), opened and established under said Ordinance No. 9525, from the east line of Wornall Road to a line one hundred and twenty (120) feet West of and parallel with the east line of the Northwest quarter ( $\frac{1}{4}$ ) of the Southwest quarter ( $\frac{1}{4}$ ) of said Section No. Four (4) and South of the South line of Sixty-third (63rd) Street, (except that portion of said parkway (along the South prolongation of Rockhill Road) as described under said Ordinance No. 9525, lying north of a line seventy (70) feet north of and parallel with the south line of the North half ( $\frac{1}{2}$ ) of the Northeast quarter ( $\frac{1}{4}$ ) of the Southeast quarter ( $\frac{1}{4}$ ) of Section No. Five (5), Township No. Forty-eight (48) North, Range No. Thirty-three (33) West, and all that portion [fol. 76] of said parkway (on certain lands near Sixty-fifth (65th) Street, as described under said Ordinance No. 9525, from a line two hundred forty-seven and three tenths (247.3) feet West of and parallel with the East line of the Southwest quarter ( $\frac{1}{4}$ ) of the Southeast quarter ( $\frac{1}{4}$ ) of the Southeast quarter ( $\frac{1}{4}$ ) of said Section No. Four (4), to the East line of the southwest quarter ( $\frac{1}{4}$ ) of the Southeast quarter ( $\frac{1}{4}$ ) of section No. Three (3), Township No. Forty-eight (48) North, Range No. Thirty-three (33) West, be and the same is hereby named and shall hereafter be known and designated as Meyer Boulevard; and

\* \* \* \* \*

Section 2. The Common Council finds and declares that the action of the Common Council has been recommended by the Board of Park Commissioners of said City as provided by law.



Section 3. All Ordinances or parts of Ordinances in conflict with this Ordinance, are, inasmuch as they conflict with this Ordinance, hereby repealed.

Passed Jul. 21, 1913. F. J. Shinnick, Speaker Lower House of the Common Council.

Passed July 28, 1913. Peter Michaels, Act. President Upper House of the Common Council.

Approved Aug. 1, 1913. Henry L. Jost, Mayor.

Attest, J. A. Bermingham, City Clerk. (Seal.)

[fol. 77] Plaintiffs also offered in evidence Resolution of the Board of Park Commissioners No. 381, identified by Mr. Gantt, the admission of which in evidence was objected to on behalf of the Defendants as irrelevant to any issue in the case. Said Resolution was admitted in evidence by the court as Plaintiffs' Exhibit 6, which, omitting the formal and immaterial portions, is as follows:

[fol. 78] PLAINTIFFS' EXHIBIT NUMBER 6 TO GANTT'S TESTIMONY

#### Resolution No. 381

A Resolution to Name the Parkway in the Westport, Southwest, and Swope Park Districts, in Kansas City, Missouri, Opened and Established under Ordinance No. 9525, Approved August 9, 1911

Whereas, the parkway, opened and established under Ordinance No. 9525, approved August 9, 1911, and entitled "An Ordinance to open and establish a public parkway along Flora, Lydia and Woodland Avenues, 64th Street and other lands in the Westport, Southwest and Swope Park Districts in Kansas City, Missouri," has not been named, and

Whereas, it is necessary for the convenience of improving the parkway, and house numbering, to establish a name or names for said parkway, therefore,

Be it resolved by the Board of Park Commissioners of Kansas City, Missouri:

#### Section 1. \* \* \*

That all that portion of the parkway (along 64th Street), opened and established under said Ordinance No. 9525, from the east line of Wornall Road to a line one hundred and twenty (120) feet west of and parallel with the east line of the northwest quarter ( $\frac{1}{4}$ ) of the southwest quarter ( $\frac{1}{4}$ ) of said Section No. Four (4) and south of the south line of Sixty-third (63) Street, (except that portion of said parkway (along the south prolongation of Rockhill Road) as described under said Ordinance No. 9525, lying north of a line seventy (70) feet north of and parallel with the south line of the north half ( $\frac{1}{2}$ ) of the northeast quarter ( $\frac{1}{4}$ ) of the southeast quarter ( $\frac{1}{4}$ ) of Section No. Five (5), Township No. Forty-eight (48) north, Range, No. Thirty-three (33) west, and all that portion of said parkway (on certain lands near Sixty Fifth (65) and Sixty-



sixth Streets, as described under said Ordinance No. 9525 from a line [fol. 79] two hundred forty-seven and three tenths (247.3) feet west of and parallel with the east line of the southwest quarter ( $\frac{1}{4}$ ) of the southeast quarter ( $\frac{1}{4}$ ) of said Section No. Four (4), to the east line of the southwest quarter ( $\frac{1}{4}$ ) of the southeast quarter ( $\frac{1}{4}$ ) of Section No. three (3), Township No. Forty-eight (48) north, Range No. Thirty-three (33) west, be and the same is hereby named and shall hereafter be known and designated as Meyer Boulevard; and

\* \* \* \* \*

Section 2. A Plat showing the lines of the parkway herein named and the boundaries thereof marked "Exhibit A," is hereby approved by this Board and made a part of this resolution, and a copy of the same shall accompany a certified copy of this resolution to be delivered to each House of the Common Council of Kansas City, Missouri as notice to said Common Council of the action and recommendation of this Board.

Office of the Board of Park Commissioners

Kansas City, Missouri

I, T. C. Harrington, Secretary of the Board of Park Commissioners, of Kansas City, Missouri, do hereby certify that the above and foregoing is a true and perfect copy of a certain resolution of said Board, known and designated as "Resolution No. 381," as the same appears of record in the office of said Board, and that said resolution was adopted by said Board of Park Commissioners at a regular meeting thereof *thereof* held on the 23 day of June, A. D. 1913.

In testimony whereof, I, T. C. Harrington, Secretary of the Board of Park Commissioners, of Kansas City, Missouri, have hereunto set my hand and affixed the seal of said Board, this 1st day of July, A. D. 1913.

(Signed) T. C. Harrington, Secretary of the Board of Park Commissioners of Kansas City, Missouri. (Seal.)

[fol. 80] On cross examination Mr. Gantt identified Ordinance of Kansas City, Missouri No. 24693, the original of which Ordinance was admitted in evidence as Defendants' Exhibit A, which exhibit is substantially as follows:

## [fol. 81] DEFENDANTS' EXHIBIT A TO GANTT'S TESTIMONY

Form Approved. Jay M. Lee, A. C. C.

An Ordinance Providing for and Authorizing the Work of Grading Meyer Boulevard from the West Line of Swope Parkway to the East Line of the Paseo, Stating the Nature of the Improvement, How the Cost Thereof Shall be Paid, and How the Assessments Therefor shall be Made and Levied, and Ratifying, Approving and Confirming a contract Therefor with the McMillan Contracting Company

Be it ordained by the Common Council of Kansas City:

Section 1. That Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, be graded to the full width thereof, and to the established grade of the same.

Section 2. That the said work and improvement shall be of the nature described and specified in and shall be done in accordance with the plans and specifications adopted, perfected and approved by the Board of Park Commissioners on the 11th day of December 1914, by Resolution No. 1761, and with the terms of the contract and specifications therefore between the McMillan Contracting Company as principal E. E. Tutt and Fidelity & Deposit Company of Maryland as sureties and the Board of Park Commissioners in behalf of Kansas City, Missouri, dated the 26th day of October 1915, which said plans and specifications are now on file in the office of said Board; that said contract is hereby ratified, approved and confirmed, and that said plans, specifications and contract are hereby made a part of this Ordinance as fully and with the same effect as though set out verbatim. And the said work and improvement shall be made and executed and the contract price paid as herein provided. Said improvement is hereby provided for and authorized.

Section 3. Payment of the cost of all of said work, after deducting the portion of the whole cost, if any, which the City may pay, shall be made in special tax bills, evidencing special assessments made and levied against each lot or parcel of land chargeable therewith by ap-[fol. 82] portioning such cost among and against the various lots, tracts and parcels of land benefited thereby within the benefit district provided and described in Ordinance No. 21831, approved January 26, 1915, according to the assessed value thereof, exclusive of improvements, all as provided in Section No. 28 of Article VIII of the Charter of Kansas City, Missouri, and as provided in said Ordinance No. 21831; and the said benefit district within which parcels of land are benefited as aforesaid, and within which it is proposed to assess property for the payment of said work and improvement as aforesaid, and as set forth in said Ordinance No. 21831, is hereby provided and determined to be as follows, to-wit:

(Here follows description of benefit district, as shown in Plaintiff's Exhibit No. 12.)

The improvement provided for herein the Common Council deems necessary to have done, but the passage of this Ordinance and the doing of said work shall not render Kansas City liable to pay for such work, or any part thereof, otherwise than by the issue of special tax bills.

Section 4. The special tax bills to be issued for the work and improvement herein provided for shall be made payable in ten (10) equal installments according to law; the first installment to become due and collectible as provided in Section No. 25 of Article VII of the Charter of Kansas City, Missouri, in case of tax bills payable in installments, and the remaining installments to become due and collectible one each year thereafter according to law until all of said installments are paid.

Section 5. All ordinances or parts of ordinances in conflict with this ordinance are, insofar as they conflict with this ordinance, hereby repealed.

This ordinance is hereby recommended this 2nd day of November, 1915.

Board of Park Commissioners of Kansas City, Missouri, By [fol. 83] Cusil Lechtman, President. Attest: T. C. Harrington, Secretary. (Seal.)

Passed Nov. 15, 1915. Miles Bulger, Speaker Lower House of the Common Council.

Passed Nov. 29, 1915. J. Leo Ryan, President Upper House of the Common Council.

Approved Dec. 9, 1915. Henry L. Jost, Mayor. Attest: J. A. Bermingham, City Clerk. (Seal.)

[fol. 84] There was introduced as Defendants' Exhibit B, after identification by the witness, Resolution of the Board of Public Works of Kansas City, Missouri No. 85155, which is in words and figures as follows:

[fol. 85] DEFENDANTS' EXHIBIT B TO GANTT'S TESTIMONY

#### Entry No. 85155

Whereas, under date of October 26, 1915, the Board of Park Commissioners of Kansas City, Missouri, in behalf of said city, executed a contract with the McMillan Construction Company, a corporation, as principal, and the Fidelity Deposit Company of Maryland, and E. E. Tutt, as sureties, for the doing of certain work therein referred to, and

Whereas, by ordinance of Kansas City, Missouri, numbered 24693, approved December 9, 1915, said contract was duly ratified, approved and confirmed, Now Therefore,

Be it resolved by the Board of Public Works of Kansas City, Missouri:

Section 1. That said ordinance and said contract and the doing of the work thereunder in accordance therewith, be and the same are hereby in all respects approved and recommended by this Board.

Section 2. That the president and secretary of this Board are hereby authorized and directed to endorse the approval of this Board on said ordinance.

We, the undersigned, respectively president and secretary of the Board of Public Works of Kansas City, Missouri, hereby certify that the above and foregoing resolution was duly adopted and entered of record under Entry No. 85155, in the office of said Board this 10 day of December, 1915.

Witness our hands:

A. E. Gallagher, President. Attest: Thos. F. Callahan, Secretary. (Seal.)

[fol. 86] SEAMAN RUSSELL, being duly sworn and examined on behalf of Plaintiffs, testified:

That he is Information Clerk for the Board of Public Works of Kansas City, Missouri, and as such identified Volume 92 of the Grading Record on file in the office of the Board of Public Works, which Volume at Pages 209 to 212 inclusive shows the apportionment of the tax bills for the grading on Meyer Boulevard, the assessed value of the various tracts in the benefit district and the appraisal made by the City Assessor.

Said Pages 209 to 212 inclusive of Volume 92 of the Grading Record in the office of the Board of Public Works were introduced in evidence by the Complainants and are substantially as follows:

[fol. 87]

#### EXHIBIT IN EVIDENCE

##### Assessment Roll

Assessment of Lands, Apportionment of Special Tax, and Register of Special Tax Bills for Grading Meyer Boulevard from the West Line of Swope Parkway to the East Line of the Paseo.

##### McMillan Contracting Company, Contractor

These tax bills are payable in Ten annual installments.

(a) Ordinance No. 24693. Approved December 9th, 1915. No. of Cu. yds. earth 305,062.24. No. of Cu. yds. rock 24,101.94. Cost per cu. yd. earth 25½ cts. Cost per cu. yd. rock 80 cts. Total Cost \$97,688.90.

(b) Sent to City Assessor Nov. 16, 1916. Recd. from City Assessor Nov. 21, 1916. Total Assessment \$378,955.00. Rate .25778497.

No. of bill	Tract number	Value of land	Owner's name	Apportionment of tax	
				Total	Installment
1	1	435	Methodist Church.....	112.10	.....
2	2	25,965	Gertrude M. Brown.....	6,693.40	669.34
3	3	25.440	Felix H. Swope.....	6,558.00	655.80
4	4	3,920	Thos. H. Swope Estate.....	1,010.50	101.05
5	5	5,760	Thos. H. Swope Estate.....	1,484.80	148.48
6	6	29,000	Thos. H. Swope Estate.....	7,475.80	747.58
7	7	26,320	Stella Swope et al.....	6,784.90	678.49
8	8	29,250	Felix Swope.....	7,540.20	754.02
9	9	9,435	Thos. Swope Estate.....	2,432.20	243.22
10	10	30,360	Thos. Swope Estate.....	7,826.40	782.64
11	11	48,535	Evanston Park Rty. Co....	12,511.00	1,251.16
12	12	11,930	Thos. H. Swope Estate....	3,075.40	307.54
13	13	24,000	Thos. H. Swope Estate....	6,186.90	618.69
14	14	24,920	Carrie S. Abernathy.....	6,424.00	642.40
[fol. 88]					
15	15	24,570	Carrie S. Abernathy.....	6,333.80	633.38
16	16	6,020	Granite Land Co.....	1,551.90	155.19
17	17	6,525	Fred B. Heath et al.....	1,682.00	168.20
18	18	9,750	Richard W. Hocker.....	2,513.40	251.34
19	19	18,480	Dudley Harper et al.....	4,763.90	476.39
20	20	6,460	Geo. W. Menke.....	1,665.30	166.53
21	21	3,320	Mary R. Jacobs.....	855.80	85.58
22	22	3,015	Laure M. Parker.....	777.20	77.72
23	23	4,425	Dudley Harper et al.....	1,140.70	114.07
24	24	1,120	Dudley Harper et al.....	288.70	28.87

## Board of Public Works

95682.

Kansas City, Mo., Nov. 14, 1916.

To the City Assessor:

You are hereby required to make and return to this Board an assessment of the value of all lands exclusive of improvements, within the limits prescribed and determined by Ordinance No. 24693, approved December 9th, 1915, under the provisions of Section 28, Article 8, of the Charter of Kansas City, for the purpose of charging the same with the cost of grading Meyer Boulevard, from the west line of Swope Parkway to the east line of The Paseo, as provided by said Ordinance No. 24693, directing the grading of said Boulevard, as required by said Ordinance and by Sections 3 and 28, of Article 8, of the Charter of Kansas City aforesaid.

The Board of Public Works of Kansas City, Missouri, By L. Oppenstein, President. Attest: J. Pearce Kane, Secretary. (Seal.)

I, Robert S. Stone, City Assessor of Kansas City, aforesaid, certify [fol. 89] that the lands mentioned in the foregoing statement or roll, have been by me fairly and legally assessed, and that my report thereof in the column headed "Value of land fixed by the City Assessor," is correct, I having made such assessment as directed by the Board of Public Works.

Witness my hand this 18th day of November, 1916.

No. 95903.

Robert S. Stone, City Assessor.

## Board of Public Works

No. 95903.

Kansas City, Missouri, November 21, 1916.

The Board of Public Works hereby certifies that it has apportioned the cost of the work of grading Meyer Boulevard, from the west line of Swope Parkway to the east line of The Paseo, as provided by Ordinance No. 24693, approved December 9th, 1915, among the several lots and parcels of land to be charged therewith and charged each lot or parcel of land with its proper share of said cost; and that the foregoing is the correct apportionment of such cost, according to the values of said lots and parcels of land.

The Board of Public Works of Kansas City, Missouri, By L. Oppenstein, President. Attest: J. Pearce Kane, Secretary.

Kansas City, Missouri, November 23rd, 1916.

Received this day the above mentioned Special Tax Bills amounting to the sum of Ninety Seven Thousand Six Hundred and Eighty and 90/100 Dollars, the same being in full of all claims against the City of Kansas City on account of the above mentioned work.

McMillan Contracting Company, Contractor, By Fidelity Trust Company, Assignee, By Lester W. Hall, Vice President.

[fol. 90] MAURICE CAREY, being duly sworn and examined on behalf of the Complainants testified that he is Chief Clerk in the office of the City Treasurer of Kansas City, Missouri, and as such identified the Land Tax Books on file in the City Treasurer's office for the years 1915, 1916 and 1917, which books show the assessed value of property in Kansas City, Missouri for said years as fixed by the County Assessor for purposes of general taxation.

Said books were offered in evidence by the Complainants as to the particular tracts in controversy in this suit, to the admission of which evidence the Defendants objected on the ground that said evidence was incompetent, irrelevant and immaterial and as having no bearing upon any issue in the case. Said books were admitted in evidence by the court over the defendants' objection as to the particular tracts in controversy.

The assessed valuations of each tract in controversy as shown by said Land Tax Books for the year 1915, 1916 and 1917 so admitted in evidence by the court are as follows:

[fol. 91]

## EXHIBIT IN EVIDENCE

Assessment for Purposes of General Taxation of Tracts in Benefit District for 1915, 1916, and 1917

Tract number	Owner	1915	1916	1917
2	Gertrude M. Brown.....	\$4,750	\$4,750	\$5,000
3	Felix H. Swope.....	4,470	4,470	4,320
8	Felix H. Swope.....	6,240	6,240	6,240
11	Evanston Park Realty Co.....	12,480	12,480	12,480
14	Carrie Singer Abernathy.....	6,400	6,400	6,400
15	Carrie Singer Abernathy.....	6,000	6,000	6,000

[fol. 92] Mr. Bowersock: If the testimony in regard to the assessed values of these lots is admitted we desire to offer from these same books the assessed values of all property in the benefit district.

The Court: Very well, I think that ought to be done.

Said Land Tax Books were, thereupon, admitted in evidence as to all the tracts in the benefit district; the assessed valuations of said tracts as shown by said books for the years 1915, 1916 and 1917 so admitted in evidence are as follows:

[fol. 93]

EXHIBIT IN EVIDENCE

Assessment for Purposes of General Taxation of Tracts in Benefit District for 1915, 1916, and 1917

Tract number	Owner	1915	1916	1917
2	Gertrude M. Brown.....	\$4,750	\$4,750	\$5,000
3	Felix H. Swope.....	4,470	4,470	4,320
8	Felix H. Swope.....	6,240	6,240	6,240
14	Carrie Singer Abernathy.....	6,400	6,400	6,400
15	Carrie Singer Abernathy.....	6,000	6,000	6,000
4	Thos. H. Swope, Jr.....	780	5 & 6	680
5 & 6	Thos. H. Swope, Jr.....	9,390	10,170	9,390
7	Margaret Swope Miller, Sarah Swope and Stella Swope.....	6,240	6,240	6,240
9 & 10	Thos. Swope, Jr.....	10,350	10,350	10,350
11	Evanston-Park Realty Co.....	12,480	12,480	12,480
12 & 13	Thos. Swope, Jr.....	10,360	10,360	10,360
16	Granite Land Co.....	1,500	1,500	1,500
17	Frederick B. Heath, James C. Leiter, Geo. A. Leiter, Gustave W. Bachman, Richard W. Hocker.....	1,500	1,500	1,500
18	Richard W. Hocker.....	3,000	3,000	3,000
19	Nannie R. Harper et al.....	4,860	4,860	4,860
20	William V. Wherrett.....	1,600	1,600	1,600
21	Cora A. Garry et al.....	750	750	750
22	Laura M. Parker.....	750	750	750
23 & 24	Nannie R. Harper et al.....	8,600	8,600	8,600

[fol. 94] Thereupon Complainant- offered in evidence tax bill No. 11 purporting to have been issued pursuant to Ordinance of Kansas City, Missouri, No. 24693, said tax bill covering the tract in controversy.

Said tax bill was admitted in evidence as Plaintiffs' Exhibit No. 10.

Said tax bill is in substantially yhe following form:

[fol. 95]

EVIDENCE: PLAINTIFFS' EXHIBIT NO. 10

No. 11. Ordinance No. 24693

State of Missouri

Kansas City Special Tax Bill

Issued on the Installment Plan

This is to certify, That the following described land, exclusive of improvements, situate within the corporate limits of Kansas City,



Jackson County, and State of Missouri, to-wit: (Here following description of tract No. 11), has been duly asse-d and charged with the sum of Twelve Thousand Five Hundred Eleven and 60/100 Dollars (\$12,511.60) as a special tax to pay its proportionate share of the cost of the public improvement provided for in Ordinance No. 24693 of Kansas City, Missouri.

Said work has been completed according to contract by McMillan Contracting Company, the Contractor, for said improvement, to whom this Special Tax Bill is issued in part payment therefor, and has been accepted by the Board of Public Works, and the said sum has been duly levied, apportioned and charged against said land, as provided by law, and is a lien thereon from and after this date. Such lien shall continue for a period of one year after the date the last installment matures, as expressed upon its face and no longer unless, within such year, suit shall have been instituted to collect this Tax Bill, and unless within ten days after the institution of such suit notice of the bringing of such suit shall have been filed with the City Treasurer, in which case the lien of this Tax Bill shall continue until the termination of such suit and until the sale of the property under execution of the judgment establishing the same, and no default in the payment of any interest or any installment shall operate to diminish the period during which such lien shall continue, or during which suit may be brought.

[fol. 96] This Tax Bill is payable in ten equal installments.

(Here follow amounts of the various installments together with the dates on which they are payable.)

If any installment of this Tax Bill be not paid when due, then all the unpaid installments shall immediately become due and collectible, together with interest thereon, at the rate of eight per cent. per annum from the date to which interest has already been paid on said installments.

Certified in the name of the President of the Board of Public Works by the undersigned person by said Board thereto authorized by resolution duly adopted and recorded on the records of said Board this 21 day of Nov. 1916.

L. Oppenstein, President, By M. E. Clinard.

[fol. 97] CHARLES D. WOODWARD, being duly sworn and examined on behalf of the Complainants testified as follows:

My name is Charles D. Woodward; I live in Kansas City, Missouri, my profession being that of an engineer. I practice with the firm of Tuttle, Ayres, Woodward Engineering Company, and am a member of that firm. I have been in that business about fourteen years.

I have made some measurements and investigations and tabulations in reference to the grading proceedings on Meyer Boulevard involved in this case. I have taken the plat prepared at the City Engineer's office and reduced it to half scale. This (Plaintiffs' Exhibit 12) is a blue-print reduction or half scale plat of the original

plan for grading Meyer Boulevard from the west line of Swope Parkway to the east line of Paseo. The scale indicated at the bottom of the exhibit marked under the work "profile" correctly indicates the scale of this map and the scale of the original drawing of which it is an exact duplicate. This map (Exhibit 12) shows the street line, the lines of the boulevard as contemplated to be graded at that time, the ownership lines and the lines of the benefit district to be assessed for the improvement. The exhibit also shows in colors the division of the tax assessed against the different tracts according to the areas of certain portions of certain tracts. The north boundary line of the benefit district is the south line of 63rd Street; the south line of the benefit district is the north line of 67th Street; the east line of the benefit district is the center line of Swope Parkway; the west line of the benefit district is the west line of the east half of the east half of the northwest quarter of the southeast quarter of Section 4, Township 48, Range 33, from 65th Street to a point 1,079 feet south of the center of 65th street. It is the northerly [fol. 98] prolongation of the east line of the Paseo south of Meyer Boulevard. On the map some of the streets are outlined and some are not; for instance 67th Street is marked through, Prospect Avenue is marked through, 65th Street is marked partially through. This indicates, I think, the condition at the time of the grading proceeding. At any rate this is the condition shown on the original plat of which this is a copy. I am not certain whether 65th Street had actually been opened from Brooklyn to Prospect as indicated on the map.

The large heavy line shown on the map through the entire benefit district is intended to outline Meyer Boulevard from points where it is to be graded. The distance along the center line of Meyer Boulevard from the east line of Prospect to the west line of Swope Parkway is 5,560 feet, or in other words approximately a mile in length. The width of the Boulevard as improved running east from Brooklyn is 220 feet up to a point approximately 800 feet west of Swope Parkway and widens to a width of 500 feet and continues east at that width through Swope Parkway. At the extreme right hand part of the map appear the words "Swope Park." Those words represent the location of the entrance to Swope Park immediately to the east of the widened part of Meyer Boulevard—in other words the Boulevard leads directly into the Park.

The distance from Meyer Boulevard to the southermost point of the Abernathy tract is 530 feet—that is the nearest point that the Abernathy tract reaches toward the improvement is approximately 530 feet. The distance from the Boulevard along Prospect Avenue to 63rd Street is approximately 1,820 feet. The distance from Meyer Boulevard to the southernmost part of the Abernathy tract on the west side of the Abernathy tract is approximately 690 feet. The distance from Meyer Boulevard to 63rd Street, that is, to the northernmost part of the Abernathy tract on Brooklyn Avenue is approximately 1,980 feet.

[fol. 99] The southeast corner of tract 11 (the Hagerman tract) is approximately 250 feet of the north line of Meyer Boulevard. The

southwest corner of Tract 11 is approximately 480 feet north of the north line of Meyer Boulevard. The southwest corner of Tract 8 is approximately 250 feet north of the north line of Meyer Boulevard and the southeast corner is 208 feet north of the north line of Meyer Boulevard. The northeast corner of Tract 11 is approximately 1,540 feet north of the north line of Meyer Boulevard. The northwest corner of Tract 11 is approximately 1,770 feet north of the north line of Meyer Boulevard.

The southwest corner of Tract 3 is 208 feet north of the north line of Meyer Boulevard and the southeast corner of Tract 3 is 248 feet north of the north line of Meyer Boulevard. The southeast corner of Tract 2 is 728 feet north of the north line of Meyer Boulevard. The southwest corner of Tract 2 is 868 feet north of the north line of Meyer Boulevard. The northeast corner of Tract 1 is 1,358 feet north of the north line of Meyer Boulevard. The northwest corner of Tract 2 is 1,498 feet north of the north line of Meyer Boulevard.

The distance from the intersection of Meyer Boulevard and Brooklyn Avenue to Ninth Street and Grand Avenue in Kansas City, which is the location of the Post Office and Federal Building is 6.7 miles, on a straight line, and 7.6 miles by the shortest traveled line.

On this blue print the numbers marked in large figures represent the numbers of the various tracts lying within the benefit district according to their tax bill number. The figure "T" followed by figures representing dollars and cents represent the amount of the tax bills assessed against each of these tracts. The "A" refers to that [fol. 100] portion of each tract lying within 150 feet of Meyer Boulevard and the amount following the letter "A" is to the amount of the tax against each tract as the area of that portion of the tract lying within 150 feet of Meyer Boulevard is to the area of the entire tract. The letter "X" refers to that portion of each tract lying within 150 feet of 63rd Street and the amount following the letter "X" is to the amount of the tax against each tract as the area of that portion lying within 150 feet of 63rd Street is to the area of the entire tract. The yellow lines on each side of the Boulevard indicate lines parallel with the Boulevard lines 150 feet distant from the Boulevard. The line just south of 63rd Street is a line 150 feet south of and parallel to the south line of 63rd Street.

Mr. Langworthy:

Q. Now, I wish you would take the total amount of the tax which according to your estimate was assessed against the 150 feet immediately south of 63rd Street along the entire northern area of the benefit district and compare the total amount of that tax to the total amount of the tax assessed against the land immediately south of Meyer Boulevard for a distance of 150 feet?

At this point defendants objected to the admission of such testimony on the ground that it had no bearing on the issues involved in the case. This objection was by the Court overruled and the witness permitted to answer.

A. The total amount of the tax assessed against the 150 feet strip lying immediately south of and adjoining the south line of 63rd Street is approximately \$6,594.00. The total amount of the tax assessed against the 150 feet lying immediately south of and adjoining Meyer Boulevard is approximately \$6,060.00. The tract of 150 feet just south of 63rd Street and the tract of 150 feet just south of Meyer Boulevard are approximately the same in area. The tract 150 feet south of Meyer Boulevard has slightly the greater area. The [fol. 101] approximate total area of the land lying on both sides of Meyer Boulevard from Brooklyn to Swope Park and extending back 150 feet from the Boulevard line is  $37\frac{1}{2}$  acres.

The total area of Tracts 14 and 15 inclusive of streets is 36.4 acres. Therefore, the total area of all the land lying on both sides of the Boulevard extending back 150 feet is slightly more than the total area of Tracts 14 and 15.

The total tax assessed against all of the property along both sides of the Boulevard extending back for a distance of 150 feet is \$12,696.00.

The total tax assessed against Tracts 14 and 15 is \$12,758.00, so that Tracts 14 and 15 have a less area than the land adjacent to the Boulevard on both sides, extending back 150 feet, but the tax assessed against Tracts 14 and 15 is greater than the tax assessed against said area.

Complainants thereupon offered in evidence the computation or compilation made by witness. This compilation was admitted in evidence by the Court over the defendants' objections as Exhibit 14.

It is in words and figures as follows:

[fol. 102] PLAINTIFFS' EXHIBIT No. 14 TO WOODWARD'S TESTIMONY

Frank Tuttle, Albert T. Ayers, Charles D. Woodward

Telephone, Home—Main 87; Bell—Main 5004

Tuttle-Ayers-Woodward Engineering Co.

Civil Engineers

305-306-307 Reliance Building

214 East 10th Street

Kansas City

Feb. 13, 1920.

Mr. Roy Thompson,  
Searritt Building,  
City:

We have prepared the following table which together with blue prints herewith enclosed sets forth the results of our investigation of the Meyer Boulevard Grading from The Paseo to Swope Parkway:

Tax bill No.	Amount of tax bill on		Area of tracts fronting on blvd., acres	Area of portion of the tracts within 1,500 ft. of blvd., acres	Rate of tax per acre on tracts front- ing on blvd.	Amount of tax on 150 ft. strip if proportional to acreage basis
	Tracts north	Tracts south of Meyer Boulevard				
1.....	\$112.10	.....	.....	.....	.....	.....
2.....	6,693.40	.....	.....	.....	.....	.....
3.....	6,558.00	.....	.....	.....	.....	.....
4.....	1,010.50	.....	2.56	1.33	\$394.73	\$524.99
5.....	1,484.80	.....	3.92	3.31	378.78	1,253.75
6.....	.....	\$7,475.80	22.72	4.67	329.04	1,536.62
7.....	.....	.....	.....	.....	.....	.....
8.....	6,784.90	.....	.....	.....	.....	.....
9.....	7,540.20	.....	6.43	4.53	378.26	1,713.51
10.....	2,432.20	7,826.40	25.79	4.53	303.47	1,374.70
11.....	.....	.....	.....	.....	.....	.....
12.....	12,511.60	.....	10.29	4.44	298.87	1,327.00
13.....	3,075.40	.....	20.80	4.44	297.45	1,320.67
14.....	.....	6,186.90	.....	.....	.....	.....
15.....	6,424.00	.....	.....	.....	.....	.....
16.....	6,333.80	.....	.....	.....	.....	.....
17.....	1,551.90	.....	4.47	2.15	376.29	809.02
18.....	1,682.00	.....	7.63	2.21	329.41	728.00
19.....	2,513.40	.....	13.28	4.36	358.73	1,564.05
20.....	.....	4,763.90	.....	.....	.....	.....
21.....	1,665.30	.....	.....	.....	.....	.....
22.....	855.80	.....	.....	.....	.....	.....
23.....	777.20	.....	.....	.....	.....	.....
24.....	1,140.70	.....	3.10	0.76	367.97	279.66
.....	.....	288.70	0.83	0.76	347.83	264.35
Totals.....	\$71,147.20	26,541.70	121.82	37.49	.....	\$12,696.32

[fol. 103] Mr. Langworthy: I don't know whether I have formally offered this plat in evidence. I want to offer it together with all notations shown thereon.

Mr. Winger: That is the copy referred to in Ordinance #21831?

Mr. Langworthy: Yes.

Said plat was thereupon admitted in evidence by the Court as Plaintiff's Exhibit 12, and the same is made a part of this record and is filed herewith.

Mr. Langworthy: I also desire to offer in evidence Exhibit 13, which is a map of Kansas City, Missouri, for the year 1915. This is issued by the Board of Park Commissioners of Kansas City, Missouri, George E. Kessler, Landscape Architect. And I desire to call the Court's particular attention to the boulevards, which are marked in green showing the manner in which the boulevards throughout the city all flow into this Meyer Boulevard, which is the boulevard involved in this proceeding.

The Court thereupon admitted in evidence as Plaintiffs' Exhibit 13, said map of Kansas City, Missouri, issued by the Board of Park Commissioners. Said Exhibit is made a part of this record and is filed herewith.

Mr. Langworthy: Now, if the Court please, we haven't done it yet, but it is merely a matter of mathematical drawing. We introduced in evidence this morning Ordinances showing the benefit district which was used at the time the property was condemned for Meyer Boulevard, and, for convenience of the Court, we will ask Mr. Woodward to indicate on this map here the exact boundaries of these ordinances. It is a mere matter of putting it on the map and we will have that done. I think that is all I want to ask Mr. Woodward.

Mr. Woodward further testified that he is familiar with the division of the city into various park districts, and that Meyer Boulevard [fol. 104] vard between Brooklyn and Swope Park is located in the Swope and Southwest Park Districts, two-thirds of it being in Swope Park District and approximately one-third in the Southwest Park District.

On cross-examination Mr. Woodward testified as follows:

All the information shown on Exhibit 12 was on the original plat except that shown in yellow. I have added the information shown in yellow. The blue-print itself is an exact duplication.

The figures and letters just inside the exterior lines of the Boulevard represent the actual cut and fill proposed to be made at those points. The fill is indicated by the letter "F" the cut by the letter "C." The figures are in feet and decimals thereof. The grade of Meyer Boulevard from Brooklyn to Swope Parkway is substantially as shown on the plat.

[fol. 105] Brooklyn and Swope Parkway are practically on the same level but the grade of the Boulevard dips down at Prospect about 8 feet and then starts to rise again to Swope Parkway. It is



practically a plane from Brooklyn to Prospect and from Prospect to Swope Parkway.

There is a profile on the lower margin of the map to indicate the grade on the north and south roadway of the Boulevard. The upper heavy line is the north roadway and the lower line is the south roadway. The roadways are 150 feet apart and the profiles are considerably different. The width of the entire Boulevard is 220 feet and the space between the roadways is perhaps 70 feet.

The dotted lines on each side of the outline of the Boulevard in white indicates the toe of the slope from the embankment made to bring the proposed Boulevard to grade, that is to say, this dotted line appearing north of the Boulevard in Tracts 17 and 18 represents a fill at those points and that was about the toe of the slope or bottom of the slope of the proposed fill. The same is true of the dotted line just south of the Boulevard. Of the property along the north side of the Boulevard approximately 2,600 of the 5,500 feet is below grade. Of the property on the south side of the Boulevard approximately 3,200 feet is below grade. This appears from the profile shown at the bottom of the plat.

The names on this Exhibit 12 appear just as they were shown on the original plat; they are exact copies. Those names are the names of the owners of the tracts and in some cases of the lessees.

All of the distances and areas and amounts to which I have testified have been taken from the measurements on the map and are merely computations.

[fol. 106] Redirect examination.

By Mr. Langworthy:

Q. Mr. Woodward, just one or two more questions: do I understand that Meyer Boulevard from Brooklyn to Swope Park has now been graded the entire width of the boulevard? That is, between these lines indicated here the entire width of the boulevard? What I am getting at, what I want to know is, whether it has been graded, just a roadway itself, or whether it is graded for the entire width of the boulevard?

A. Graded for its entire width.

Q. Graded for its entire width; now then, I wish to you would state to the Court, beginning at Brooklyn or beginning at the extreme west point of Meyer Boulevard in this benefit district, state to the Court, if you can, the width of the actual roadway or road which is paved and in use on each side of the boulevard?

Mr. Bowersock: I think we are going to object to that as being entirely irrelevant.

Mr. Langworthy: It seems to me very material, because it will show a very large part of this grading was not a roadway or street at all, but grading for a park, because between these two roadways provision was made for a very large roadway or park and I think it is material for Your Honor to know what the determining issues before you are as to what part of this grading was taken for a road-

way or park and what part was taken for a boulevard. We claim it was really an extension of Swope Park.

The Court: Very Well. He may answer, subject to the objection.

To which last action and ruling of the Court, the Defendants, and each of them, by their counsel, at the time duly excepted, and still except.

Q. I wish you would state those figures to the Court, if you will, Mr. Woodward?

[fol. 107] A. In that portion of the boulevard having a width of 220 feet, which is the greater part of its length, the roadways on both the north and south sides are 40 feet inside of the property line and these roadways are macadam, having a width of about thirty feet, which leaves, approximately eighty feet at the present time between the roadways.

Q. Do I understand that the distance between the property line and the roadway proper is about forty feet?

A. Forty feet.

Q. And then the roadway, which is about thirty feet wide?

A. About thirty.

Q. And for the parkway in between the two roadways, the width of that is about eighty feet?

A. About eighty feet.

Q. And then roadway thirty feet and then the distance to the other side?

A. Yes sir.

Q. What is there between the park line and roadway, this distance of forty feet you have mentioned?

A. Both the parkways and the center parkway are now in alfalfa.

Q. In other words between the two lines of the yellow where it is 220 feet wide you have a roadway along the south line about thirty feet in width and a roadway along the north line about thirty feet in width?

A. Forty.

Q. Forty; and the remaining part is just grass and alfalfa?

A. Yes sir.

Q. Now then, how is it with respect to that part of the boulevard that is five hundred feet in width just before it reaches Swope Park? There is how much taken up in roadways and how much taken up in grass or parkway?

[fol. 108] A. As these roadways coming from the west approach Swope Park and in about 700 feet west of Swope Parkway they diverge, swinging out away from each other around an oval egg-shaped piece perhaps 350 feet in width and then converge again at Swope Parkway. This center parkway perhaps being 500 feet east and west and nearly 350 feet north and south.

Q. How much ground, measured, if you are able to give it, is there between the roadways just before they enter Swone Park as they widen out here at this wider part of the boulevard?

A. At their widest part I didn't measure it. My opinion is that it is at least 800 feet apart.

Q. Now what I want to get at, If you can state it, is approximately the number of acres embraced between the parkways where they separate and come around this oval egg-shaped piece you have testified to?

A. Three or four acres.

Q. There is three or four acres embraced between the roadways in this wider part of the boulevard just before you enter Swope Park?

A. That would be my opinion.

Q. Now are the driveways themselves of the same width at this point where they enter this part of the boulevard 500 feet in width?

A. The same width, yes; approximately 30 feet.

Q. 30 feet all the way clear up to the entrance to Swope Park?

A. Yes sir.

Q. Mr. Woodward, could you state to the Court how many acres beginning now at the west end of the boulevard; that is, the west end of the benefit district, can you state to the Court how many acres there are embraced within the boundary lines of Meyer Boulevard that are in alfalfa or in grass as distinguished from the part that is actually used for roadways?

A. I would say there were perhaps twelve or fifteen acres.

Q. Twelve or fifteen acres of that number that are in grass or alfalfa?

A. Yes sir.

[fol. 109] Q. Now can you state the total area that is graded by Meyer Boulevard within this benefit district?

A. I have just been guessing at this, I better do a little figuring.

Q. I want you to give it as near accurate as you can?

A. Total area graded is approximately 32 acres and the total area of the roadways is approximately 9 acres, so I would have to correct my statement as to the area in alfalfa and grass and say that that area is perhaps about 23 acres instead of 12 to 15.

[fol. 110] On Recross examination Mr. Woodward testified as follows:

My figures as to the size of the roadways and as to the spaces between the roadways are based upon my knowledge of the conditions and the ground and are not taken from the map. This map shows the roadways according to the proposed plan for improvement which was not followed in construction. The roadways are in the same position as planned except that the inner 10 feet or so of the roadways has not been constructed. Where the plan was for a roadway of 40 feet in width the inner 10 feet has been left off to be added when the traffic so warranted. The entire roadway might be paved for traffic and the entire space between the roadways could be paved if the traffic so demanded. Up to date, however, there has not been as much paving of the highway as the original plans called for.

Thereupon Complainants offered in evidence certain extracts from the official public report of the Board of Park Commissioners for the year 1914. This was admitted in evidence over the objection of the defendants.

The extracts admitted are shown at page 32 and at pages 42 to 46 inclusive of said report. At Page 32 of said report appears the following:

#### EXHIBIT IN EVIDENCE

"From the Paseo east into the 65th Street entrance to Swope Park, this width is 220 feet and its improvement as planned carries two roadways with a central parking between, thus diversifying the line. This great east and west reach receives practically all of the north and south lines of boulevards and parkways. Every one of these lines of boulevards and parkways throughout the entire system are really merely connections between Swope Park on the southeast and the business district of the city on the northwest."

At pages 42 to 46 of said report appears the following:

[fol. 111]

#### "Swope Park

Since 1896, the year in which Mr. Swope's munificence secured to Kansas City its great outlying playground, the community has spent a very considerable sum in the development of this property. Its 1,332 acres, however, requires so long a time and so great means that comparatively little has really been accomplished.

With this, however, the property has been constantly increasing in favor of the public and used to such a very great extent, that material improvement becomes essential with every year.

Today the northwesterly area of the park is well provided with roadways, with great picnic groves and the bluegrass meadows characteristic of this section of the country. It has even with those comparatively limited improvements become so attractive in all its forms of recreation and good appearance that the Kansas City public with every opportunity makes most liberal use of this as a playground.

The presence of the Zoological Park within this property has established in its northern district a center to which everyone comes. Its roadway system to that point is excellent. The Zoo is serving as a tremendously attractive feature. With it there should be an aquarium display as well as the animals and birds, becoming a part of the Zoo group of buildings already in place. In addition to this there should be provision for a possible botanical garden with its display of outdoor as well as indoor plants. This will in time require a group of fine conservatories aside from the propagating houses now serving from Swope Park the entire park system.

The temporary nine-hole golf course along 67th Street has proven [fol. 112] an exceedingly valuable factor in the property's use. The presence of the Shelter Building and its surrounding great gardens, the temporary Refectory Building and the extremely valuable picnic shelter building have all centered practically all of the use of the place in the northern and western section. One minor feature of astonishing importance in the improvement of the property has been in the picnic use of the place. This use has been very greatly facilitated and made comfortable with the existence on the picnic spots of the outdoor cook stoves, giving opportunity for

picnic parties to eat their own cooking at these points. The development of the Lagoon in the natural depression of the lowlands east of Blue River has begun to establish another great play center on that district of the northern section of the park. This is made directly accessible so far by a pedestrian bridge across the Blue and the athletic field, together with the Polo field, boat house and general play field have proven exceedingly attractive. The later development and practical completion this year of the new 18-hole golf course on the hills and within the forest on the eastern boundary, further develops the easterly play fields of this great park.

Every additional area brought into use accentuates the necessity for further means of access. Primarily, of course, this calls for roadways and upon their completion the necessary pathways leading from the street railway terminus to all of the play centers.

In connection with these necessities, your particular attention is called to the need of roadway crossings and pathway crossings over the two steam railways, which together occupy a 100 foot right of way through the park, and crossing over the Blue River. The needs in this respect for many years to come will be amply served by [fol. 113] by two bridges—one across the railroad and the Blue together on a line which is approximately 64th Street northeastward of the Zoo and tying the northern section of the park with the playfields and The Lagoon on the east and connecting directly thereby with the Blue Ridge Road which enters the park at its north-eastern corner. That portion of this bridge which should span the Blue River may and in the judgment of the writer should be in the form of a memorial, which would give at least a small expression of gratitude to the donor of this great property. The second, and perhaps even still more important bridge at this time is the one prepared for across the railroads and the Blue River where these are adjoining on the line of 71st Street. This line is the thoroughfare from the north and west through the park to the south and east and is absolutely essential in order to replace an old iron country bridge which is not hardly sufficient to properly care for the increasingly great travel on that road, in doing this making possible the elimination of a grade crossing of the two railroads which is and always has been extremely dangerous to all who use this crossing.

There are numerous points of extremely great interest in Swope Park deserving of development and use. None of these, particularly south and southeast, will become available until roadways long planned for are built. Each year by a systematic development of particular sections, material improvements should be accomplished. Even then it will require several generations to complete the improvements which might be considered as a completion of this park.

The building of the street railway, extending this service from [fol. 114] Swope Parkway eastward along 67th Street to the head of the Zoological Park brings about the need for further improvement at that point. The plans have long provided for a park drive adjoining on the north and parallel with this street railway line. In connection therewith, there is also planned what is known as The Mall—a wide shaded pathway with all its attendant conveniences, seats and minor

embellishments, that will naturally and comfortably bring the pedestrians from the gardens and shelter on the west to the Zoo and to less formal gardens and resting place on the ridge to the west of the Zoo which will form the feature of the eastern end of The Mall, as proposed.

From Swope Parkway across the northern boundary of the park for a distance of a fraction over a quarter of a mile there has been completed the boundary park drive with its formal lawn and tree space between that and the distinctive boulevard which serves as the service highway to the abutting private properties on the north. This illustrates one feature of the completion of the boundary surrounding Swope Park. At such time as the City may be able and as quickly as it is possible to supply the funds, the entire boundary line of Swope Park should be similarly improved—not necessarily with double roadways, but with a fine highway dividing the private from the public properties throughout and wherever the topographical conditions of the boundary line make it possible. While necessarily this cannot be accomplished immediately and all at one time, yet there should be consistent effort in the direction of the acquisition of some rights-of-way. The great park properties of the country are all somewhat remote because of this, private lands on the boundaries are only slowly developed. The neglect of fine completion of the public ground on the boundaries of these great [fol. 115] parks has, therefore, invariably led to an indifference or very poor development of the private lands on their boundaries. This should not happen with Swope Park. The boundaries should be given constant and early attention.

Respectfully submitted. George E. Kessler, Landscape Architect."

[fol. 116] Mr. Woodward stated on Re-Direct Examination that according to the map of Kansas City, identified as Exhibit 13 there are in Kansas City approximately 30 or 35 miles of boulevards which would naturally lead into Meyer Boulevard and which have to depend upon, as their shortest line, Meyer Boulevard to get into Swope Park and beyond.

CARRIE SINGER ABERNATHY, being duly sworn and examined on behalf of the complainants testified as follows:

My name is Carrie Singer Abernathy. I am the owner of the two tracts of land referred to on this plat as Tracts 14 and 15, at 63rd Street and Prospect Avenue in Kansas City, Missouri, containing approximately 40 acres. The improvements on the land consist of my home and a stable. The property is also fenced. I have lived on the land ever since 1915 and before that time.

Mr. Langworthy: Mrs. Abernathy, will you state to the Court what use you make of Meyer Boulevard in going to and from your home to the various places that you may go whether to town or otherwise.



**Mr. Bowersock:** I wish to object to that as being incompetent as to what use she actually makes of the Boulevard, that question is not one that is proper. The question is not what use is actually made but what use may be made or can be made of the Boulevard.

The Court permitted the witness to answer over the said objection.

**Mrs. Abernathy** then continued: We do not use Meyer Boulevard at all. 64th Street is not through, nor is 65th Street. Brooklyn is paved but has no entrance to Meyer Boulevard. The only entrance [fol. 117] to our place comes in on Olive. The house virtually would be on Wabash and the driveway comes in on Olive from 63rd Street and in going to and from town we go out the driveway on Olive and go east on 63rd Street to Prospect and take Prospect to the City. Olive and Wabash are not marked on this plat but they are streets which if put through would come through our place between Brooklyn and Prospect extending north and south. People coming to and from our place, guests for example, and people coming for the purpose of making deliveries come out Prospect, not over Meyer Boulevard. Prospect is in excellent condition and people use Prospect in coming out. They do not come out the Paseo because 63rd Street is impassible from the west, impassible because of the paving. The pavement on 63rd Street has been in bad condition for several years.

**Mr. Langworthy:** Mrs. Abernathy, did you have any knowledge or notice of a suit brought in the Circuit Court of Jackson County, Missouri which is referred to as Cause No. 90628, entitled "In the Matter of Grading of Meyer Boulevard" did you have notice of that?

**Mr. Bowersock:** You mean legal notice? We object to that question.

**Mr. Langworthy:** I am asking her whether she had any actual notice.

**Mr. Bowersock:** I object to that as being immaterial.

The Court: Overruled; proceed.

Thereupon the witness proceeded as follows:

I had not, I had no notice. I was not given any notice of any proceedings had by the Board of Public Works with reference to the assessment or the placing of an assessed value on my property for the purposes of this proceeding or for the purposes of apportioning the assessment against my property. I did not know anything about the City Assessor making an assessment assessing the value of my [fol. 118] property for the purpose of this proceeding.

The south 20 acres of my tract is in timber and I think has temporary buildings for the stock. In the summer time there is a corn plot on the west 20 acres. In a general way the property is used for farm and pasture purposes, other than that part occupied by my residence. It is unplatted property and has no improvements on it except the residence and outbuildings in connection with the residence. This is generally true of the property out in that neighborhood. It is just open vacant property. Especially is this true of the property between my property and Meyer Boulevard.



On Cross-examination Mrs. Abernathy testified as follows:

I have lived out on this tract something over fifteen years, on the same property. We were among the first people to purchase out there. We purchased of Mr. Harper who owned a good deal of property out there at that time. We were familiar with the land when it was brought and both Mr. Abernathy and myself were very much interested in it. We did not have the pick of all the ground out there but we had a chance to buy the corner property and then later were able to secure the other 20. By the corner property I mean the cleared 20 acres southwest of the corner of Prospect and 63rd Street. We first bought the tract on Prospect, just 20 acres. That was our pick of the ground out there. Then later we bought the other 20 acres.

The house we live in is toward the north of the east 20. The house stands in about the center of the north 10 acres of the tract. There is nothing at all on the south 10 acres of south of what would be 65th Street. 64th Street is the dividing line of the 10 acres. South of 64th Street there is just vacant land. North of 64th Street is our house and the lawn around the house. The west 20 acres is [fol. 119] all timber except for a little cleared at the south end of it. We are not farming the property at all except to keep a little stock and a little garden. The house is a large stone house with red tile roof.

64th Street is not yet open. Prospect Avenue is paved in front of our property down to Meyer Boulevard. Brooklyn was paved by the property owners some years ago, but since Meyer Boulevard was cut through we cannot get down possibly, there is no entrance onto Meyer Boulevard from Brooklyn, and there is no entrance from 65th Street west into Meyer Boulevard. You can't get through from Brooklyn, you can get through only on 63rd Street. As our ground is now being used the entrance to our driveway is on 63rd Street, considerably west of Prospect, approximately at 63rd Street and Olive.

[fol. 120] WALTER DOBBS, being duly sworn and examined on behalf of the Complainants testified as follows:

My business is that of commercial photographer. I am with the Acme Photo Company at the present time. I have taken certain photographs along Meyer Boulevard between Brooklyn and Swope Parkway at Mr. Thomson's request. These photographs were taken about a year ago. The photograph marked Exhibit 16 is made from just south of Meyer Boulevard looking east at a point about Brooklyn, I would judge. Exhibit 17 is made from the same point approximately except that it is looking northeast instead of east. Exhibit 18 is looking east from a point just west of Prospect Avenue on the south side of Meyer Boulevard. Exhibit 19 is looking almost north, a little east, from a point just west of Prospect Avenue on the south side of Meyer Boulevard. Exhibit 20 is looking east on Meyer Boulevard from between the drives about a block or a block and a half west of Swope Park entrance. It shows the entrance to Swope Park. Ex-

hibit 21 is taken from the entrance of Swope Park looking west. It shows the roadways as they curve around as they come toward the entrance to Swope Park. Exhibit 22 is made from a point about two blocks north and west of the entrance of Swope Park looking northwest, showing a point near the center of the photograph which is what I believe is golf links or golf course, wherever that is. It is taken from the north of Meyer Boulevard, probably two blocks north and west of Swope Park about the same distance as near as I can remember. Exhibit 23 is taken from a point a little further north from Exhibit 22 looking southwest. These photographs correctly represent what they purport to represent.

Complainants thereupon offered in evidence the photographs referred to by the witness and they were admitted in evidence as Exhibits 16 to 23 inclusive, and are hereto attached and made a part hereof.

[fol. 121] On Cross-examination Mr. Dobbs testified as follows:

Mr. Thomson picked out the locations from which to take these photographs; he was with me at the time. He picked out the locations and the directions in which to point the camera. From some of the pictures you can tell something about the cuts and fills along the boulevard. Exhibit 17 is taken from a point above the level of Meyer Boulevard. It is taken on a bank just south. From the shady parts in the picture I can tell something about the height of the bank. Also from Exhibit 18. It is clear that the bank is about 8 feet above the boulevard, or perhaps 6 or 7 feet. The poles shown in the pictures are trolley poles on Prospect Avenue. The camera is up as high as the white line on the poles. In Exhibit 18 the dark place at the right of shelter house as it appears in the picture is a cut. I would judge that it is a cut of about 4 feet. There is nothing in the picture to indicate whether the cut is 4 feet or 6 feet or 10 feet.

[fol. 122] GARRETT ELLISON, being duly sworn and examined on behalf of the Complainants testified as follows:

I have lived in Kansas City, Missouri 55 years. For the last 35 years of that time I have been actively engaged in the real estate business. I have been familiar with real estate and real estate values in and around Kansas City for a number of years. I have recently examined and gone over the benefit district provided for in this proceeding, and the property generally in that vicinity. I have further made a study of the situation as it exists out there, and as it has existed during the past few years.

In a general way it may be said that 95% or more of the population of Kansas City is north of Meyer Boulevard as compared with the portion of the population south of the Boulevard. About 98% of the area of the City is north of the Boulevard; perhaps also 98% of the population. About the same percentage of the population lies north of 63rd Street.

With regard to the improvements on the tracts in the benefit dis-

trict as shown in Exhibit 12 I would state that on Tract 14 is the Abernathy home; on Tract 1 is a church and parsonage. The property is all vacant with these exceptions. No houses or improvements have been built in this district since Meyer Boulevard was graded and paved is as the Main entrance to Swope Park. The use to which Meyer Boulevard had been put since it has been graded and paved is as the Main entrance to Swope Park. The travel over Meyer Boulevard to Swope Park is the outlet largely of the boulevards running north and south through the City. The traffic is very largely from the City at large practically, all from [fol. 123] the City at large. On Sunday afternoons and Holidays as well as on days during the week large numbers of people go to Swope Park and there is a continuous procession east and west on this boulevard. Swope Park, as we all know, is the great playground of Kansas City. It is a very large park containing approximately 1,200 acres. It was donated to Kansas City by Thomas Swope a good many years ago, about 1896. Meyer Boulevard is the main entrance to Swope Park from the City. Entering the Park the road diverges, one road going on the west to the shelter house and the other continuing east down towards the band stand and play grounds. There are two public golf links within the Park; there are driveways all around through it. It is a large park to which the people naturally go on Holidays as a public play-ground.

The section south of the Boulevard away from the City would naturally use the Boulevard more than the property north of it. The Boulevard is primarily an entrance from the City at large to Swope Park. The property east of Brooklyn Avenue to Swope Park and south of the Boulevard would naturally use the Boulevard in going to and from the city more than the property north of it.

Mr. Langworthy:

Q. Now, referring to the tracts north of the Boulevard which do not abut on the Boulevard, I call your attention particularly first to Tracts numbered 14 and 15 known as the Abernathy tract. I wish you would state to the Court whether in your opinion that tract received any special benefit as distinguished from general benefits received by the community at large by virtue of the improvement consisting of the grading of Meyer Boulevard. I want you in answering the question to distinguish between the improvement benefit arising from the condemnation, confining it only to the benefit, if any, arising from the actual grading of Meyer Boulevard.

[fol. 124] Mr. Bowersock: I object to that as calling for the conclusion of the witness and as being contrary to the provisions of the Charter as to the method of determining benefits.

Mr. Langworthy: Well, if I can show there were no special benefits received by this property, that they didn't amount to 5¢ and were assessed for \$12,000 it seems to me it is of some importance to Your Honor in determining whether or not that benefit district is an unreasonable benefit district.

The Court: I will hear the evidence. The objection is overruled. You may answer it.

To which last action and ruling of the Court the defendants and each of them by their counsel at the time duly excepted.

A. The benefit accruing from Meyer Boulevard to Tracts 14 and 15 is largely a general benefit. There may be a very slight local benefit, but it would be very small. The property would have brought very little more after this improvement than before, if any. Before this improvement was made there were two ways of reaching Swope Park, one going from Swope Parkway to 63rd Street. 63rd Street was a heavily traveled thoroughfare at that time, but since Meyer Boulevard was graded that traffic has very largely left it and gone to Meyer Boulevard. However, that is partly accounted for by the fact that 63rd Street at present is badly out of repair. But immediately after the building of Meyer Boulevard the car traffic left 63rd and went over to Meyer Boulevard.

The same rule applies in my judgment to Tract 11 as to Tracts 14 and 15. That is, after the improvement the property would not have sold on the market for any appreciable amount more because of the grading. The same situation also applies to Tract No. 8 and Tracts 2 and 3. I think the benefit from Meyer Boulevard to those tracts, that is the special benefit, was very slight.

[fol. 125] Swope Parkway is a street 150 feet wide east of Tracts 2 and 3, with a double street car *tract* in the center and a paved roadway on either side, with sidewalks and curbing. Prior to the opening of Meyer Boulevard, Swope Parkway was the leading thoroughfare to Swope Park. It was graded and paved and was used by people going through the Park. After Meyer Boulevard was completed the traffic over Swope Parkway very largely left it and went to Meyer Boulevard; probably 75 of 80% of vehicle traffic left Swope Parkway. Of course the street car traffic was not affected. In my opinion the opening of Meyer Boulevard had a detrimental effect on the two tracts which fronted on Swope Parkway, that is, it had a detrimental effect on their selling value. The grading of Meyer Boulevard would, I think, be a serious damage to the property abutting on Swope Parkway inasmuch as traffic was taken off of Swope Parkway. I think in time the frontage of Swope Parkway would become business property. Tracts 2 and 3 lend themselves very nicely to some large development. The sale of property on Swope Parkway south of Meyer Boulevard from the south line is developing now and is business property as is reflected in the prices asked for the property. If it were possible to convert the Swope Parkway frontage of Tracts 2 and 3 into business property that would have a damaging effect on the balance of Tracts 2 and 3 for residence purposes for the reason that business always hurts residence property. If any advantage was gained by reason of converting Swope Parkway and the frontage of these tracts into business you would get an equally detrimental effect and the balance of the tracts would be less desirable for residence purposes and sell for less money.

The lessening of traffic on Swope Parkway would not in my opinion damage Tracts 2 and 3 very much as residence property.

[fol. 126] Mr. Langworthy: Mr. Ellison, will you state what in your opinion was the extent of the special benefit received by property abutting on the Boulevard by virtue of and as a result of the improvement consisting of the grading of Meyer Boulevard.

Upon objection made by the defendants to the admission of the testimony called for by the question the Court ruled as follows:

The Court: It seems to me he can inquire as to comparative actual benefits as to these different tracts and these different locations.

Mr. Bowersock: Mr. Ellison, was all the property abutting on the Boulevard equally benefited whether below grade or above grade or on grade?

Witness:

A. No, sir.

Mr. Bowersock: Then I object to a general statement on the part of the witness as to what benefit the property abutting the Boulevard received.

The Court: He can take the question of grade into consideration in making his answer. He can testify as to the general rule subject to general conditions which may exist as to a specific piece of property.

Witness:

A. The major part of the property facing or abutting on the Boulevard in a general way received the greater part of this benefit from the grading of the Boulevard. Then the property next to that was the property south. The nearer to the Boulevard the greater the benefit. Next to that the property north and the further you reside north the less the special benefit.

The Court:

Q. Now, Mr. Ellison, how would that be affected if property fronting on the Boulevard was in a disadvantageous position with respect to grade?

Witness:

A. Of course, where some of these grades, these cuts and fills are [fol. 127] very heavy the property is practically worthless. Where the cut, for instance in the 23rd Street Traffic-way is 50 feet, in that case I testified that that property is ruined, its value taken away, and in that case we allowed the property owner the full value. No such cuts or fills exist on Meyer Boulevard as I refer to on the 23rd Street Trafficway.

The Court: Are there any such cuts and fills as would seriously influence your view as to the benefit accruing?

Witness:

A. Of course the grading of the Boulevard would make the corners more valuable on the Boulevard and there is a great deal wider space graded than there is within the limits of the Boulevard itself. They graded back on either side quite a ways, just how far back I don't know.

Mr. Langworthy: As a matter of fact, just taking these pictures to refresh your recollection isn't the property on both sides of the Boulevard practically of the same depth throughout its entire length?

Mr. Bowersock: I object to that. The profile shows what the cuts and fills are and the photographs do not.

The Court: Well, I think the best evidence of that is the mathematical situation as shown by the plat.

Witness: I don't think the plat shows the exact condition there from the fact it shows the condition there at the time that the grade was contemplated, but in grading through there they graded and filled beyond the limits of the Boulevard.

Mr. Bowersock: I certainly object to any testimony of that kind.

The Court: I have before me what the plans and specifications were and I want also to hear what the actual situation is there as bearing upon the situation of the land after this improvement. As to how the contractor left the land, the presumption is he did the work pursuant to his contract.

[fol. 128] Witness: Well, Your Honor, he did go back a good deal more, he graded back from those lots for a considerable distance. In driving along the Boulevard from Brooklyn to the Paseo all the property seems apparently very close to grade. Back from the Boulevard there are places where it is below grade. To the north it is above grade. When I drove by there immediately after the grading of the Boulevard I found that someone had graded back for a long distance on either side, but abutting the lines of the Boulevard the property is left practically all on the grade of the Boulevard.

Mr. Mr. Bowersock: I object to that as not referring to any lot specified or named in the petition or any lot covered by these proceedings, or applied to any lot with which any comparison can be made.

The Court: Of course I don't think the court can pass on a situation of that kind except by some specific description of the property to be graded or platted.

On Cross Examination Mr. Ellison testified as follows:

Tracts 2 and 3 are principally residence property. It is all residence property at the present time with a tendency for some business to come in on Swope Parkway. If business should come in on Swope Parkway that would tend to injure the rest of the property as residence property.

This property north of Meyer Boulevard and up to 63rd Street is



at the present time beautiful land for residence purposes and is high and beautifully located.

Prior to the construction of Meyer Boulevard traffic on Swope Parkway near the entrance to the Park was very congested. Swope Parkway was the main entrance to Swope Park. The opening of Meyer Boulevard has very materially decreased the traffic on Swope Parkway.

The land south of Meyer Boulevard, say for example that in [fol. 129] parcels 6 and 10 slopes to the south towards 67th Street. Tracts 13 and 19 also slope to the south. 67th Street all along is lower than Meyer Boulevard, quite a little lower. South of 67th Street the property is built up and the streets are improved. The land south of 67th Street has been platted and is considerably occupied by homes. The residences there are medium priced until you get down to 67th Street and Swope Parkway where there is a business center.

Mr. Bowersock: Now you testified you thought a major part of the benefit, as I remember it, the greater part of the benefit to the property there from the building of Meyer Boulevard was to the property next to the boulevard?

Witness: Yes sir.

Mr. Bowersock: This plat, Mr. Ellison, at about the middle of Tract 6 shows a fill on Meyer Boulevard of 26 feet.

Witness: Those cuts and fills at the present time aren't apparent from the Boulevard.

Mr. Bowersock: If there is a fill of 26 feet or of 22 feet or 17 feet there can you run a street through Tract 6 up into Meyer Boulevard as a practical matter?

Witness: If those facts exist all through that tract, it would be difficult. You could run them of course.

Mr. Bowersock: The plat shows here in Tract 13 that there is a cut of 16, 17 and 18 feet along there for a considerable distance of two or three hundred feet.

Witness: That is largely graded out now. I don't know the conditions of course under which it was graded down. I don't know whether the owner of the lot paid for the grading or not. When the street was opened up however it was in that condition. There is a very severe grade from 67th Street up to Meyer Boulevard.

Mr. Bowersock: If you had to go from Tract 10 down to 67th [fol. 130] street onto what is now Swope Parkway and over to Meyer Boulevard the distance from Tract 10 to Meyer Boulevard would be practically as far as the distance from Tract 14 to Meyer Boulevard wouldn't it?

Witness: The difference between those two tracts is this, that people residing on Tract 10 go north and west to the City the same as 14. 14 wouldn't come to Meyer Boulevard at all while 10 would. If 63rd Street were in good condition as it was for a long time I think people would go west to the Paseo instead of East to Prospect. The condition of the streets makes a difference of course in the route which people will travel.

The property along Meyer Boulevard is all susceptible of being



divided up into fine residence property when it is properly graded and platted.

Plaintiffs thereupon offered in evidence a certified copy of all record entries in Cause No. 90627, in the Circuit Court of Jackson County, Missouri.

The evidence was objected to by the defendants as being immaterial to any issue in the case but the objection was overruled and the certified copy admitted as Plaintiffs' Exhibit 24, which is substantially as follows:

[fol. 131] PLAINTIFFS' EXHIBIT NO. 24 TO ELLISONS' TESTIMONY

Be it remembered that on the 33rd day of the regular January Term, 1915, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 17th day of February, 1915, the following proceedings were had and made of record before Hon. Thomas J. Seehorn, Presiding Judge of Assignment Division, in the cause entitled:

Assignment Division

No. 90627

In the Matter of the Proceedings under Ordinance of Kansas City, Missouri, No. 21831, Approved January 28, 1915, Entitled. "An Ordinance to grade MEYER BOULEVARD from the West Line of Swope Parkway to the East Line of the Paseo, etc."

Now comes Kansas City, Missouri, by its Assistant City Counselor, Jay M. Lee, and files with the Court a certified copy of the aforesaid Ordinance: also a map or plat descriptive of said proceedings.

Thereupon, it is ordered by the Court that this proceeding be and now is assigned to Division numbered Nine (9) of this Court, for further hearing herein.

On the 33rd day of January Term, 1915, the same being February 17th, 1915, the following further proceedings were had and made of record in Division Number Nine, in said cause No. 90627.

Now, on this 17th day of February, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division No. 9, comes Kansas City, Missouri, by its Assistant City Counselor, Jay M. Lee, and shows to the Court that its Mayor has caused to be filed in this court a certified copy of the aforesaid Ordinance No. 21831, approved January 26, 1915, together with a statement by map containing a correct description of the several lots or parcels of private [fol. 132] property within the benefit limits prescribed by said Ordinance, and the court thereupon makes the following order herein, to-wit:

To all persons whom it may concern, Greeting:

Whereas, a certified copy of an ordinance of Kansas City, Missouri, numbered 21831, approved January 26, 1915, entitled: "An ordinance to Grade Meyer Boulevard from the West line of Swope Parkway to the East line of The Paseo and to condemn easements to support embankments or fills, describing the nature of the improvement, providing how the cost thereof shall be paid, and prescribing the limits within which private property is deemed charged to pay damages caused by said grading, and by the condemnation of said easements, and assessed and charged to pay the cost of said improvement," was by the Mayor of Kansas City, Missouri, caused to be filed and presented to this Division No. 9 of the Circuit Court of Jackson County, Missouri, at Kansas City, the general object and nature of said Ordinance being to provide for the grading of the aforesaid Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, to the established grade thereof and for the condemnation of easements to support embankments or fills, as specified in said ordinance, and providing that said proposed improvement shall be paid for in special tax bills against the lands chargeable therewith according to law, as provided by the Charter of Kansas City, and particularly as provided in Section 28, Article VIII of said Charter, and for the ascertaining and assessing of damages and benefits that may arise from said proposed improvement; and that private property may be disturbed or damaged by said proposed improvement and the owner or owners thereof and parties interested may be entitled to remuneration or damages; and that the limits prescribed and determined by said ordinance within which private property is deemed benefited by said proposed improvement [fol. 133] and may be assessed to pay said remuneration are as follows, to-wit:

(Here follows description of benefit district as shown in Plaintiff's Exhibit No. 12.)

Now, therefore, all and each of you are hereby notified that the 8th day of March, 1915, is the day, and the courtroom of Division No. 9 of this Court in the County Court House in Jackson County, Missouri, at Kansas City, is the place hereby fixed by said Court for the ascertaining and assessing of the damages and benefits that may arise from said proposed improvement, and from the condemnation of said easements, and that unless before the day set for the hearing as aforesaid, or before the day to which said cause may be postponed or continued, you file with the Clerk of said Court your claim or claims for damages, containing a description of the property claimed to be damaged and the interest of the claimant therein, you and each of you shall be forever precluded from making any claim for remuneration on account thereof, and that property assessed with benefits to pay such remuneration will be sold if the assessment is not paid.

And the Court further orders that this order be published in each issue of The Daily Record, the newspaper at the time doing the city

printing, for ten (10) days, the last insertion to be not more than one (1) week prior to the day herein fixed for said hearing, and a copy of this order be served as by the Charter of said city provided, on each and every resident of the city owning or having an interest in the real estate fronting on that part of the aforesaid Meyer Boulevard proposed to be graded under these proceedings.

On the 46th day of the January Term, 1915, the same being March 5th, 1915, the following further proceedings were had and made of record in Cause No. 90627.

[fol. 134] Comes now Thomas H. Swope, as owner of property affected by this proceeding, and files herein his claim for damages.

And comes R. W. Hocker as owner of property affected by this proceeding, and files herein his claim for damages.

On the 1st day of the March Term, 1915, the same being March 8th, 1915, the following further proceedings were had and made of record in Cause No. 90627.

Now on this 8th day of March, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City in Division numbered Eight(8), comes the said Kansas City by its City Counselor, and come all persons and parties concerned herein.

And the said Kansas City now files and submits to the Court proof of lawful publication and personal service of the orders of the Court herein made on the 17th day of February, 1915, and the Court finds that same were made as the law requires and deems no further notice herein advisable.

And for good cause shown, it is ordered that this proceeding be, and it now is adjourned to Monday, the 15th day of March, 1915, at 9:30 o'clock in the morning of said day, at the aforesaid court room, to empanel a jury herein.

On the 7th day of the March Term, 1915, the same being March 15th, 1915, the following further proceedings were had and made of record in Cause No. 90627.

Now on this 15th day of March, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division numbered Nine (9), comes the said Kansas City by its City Counselor, and comes all persons and parties concerned herein:

[fol. 135] Thereupon, the Court duly chooses as the board of commissioners herein, G. V. Musser, J. A. W. Eames, James H. Rout, J. A. Minor, Lee Koehler and C. H. Whitehead, six good and lawful men, disinterested freeholders in the said Kansas City, well qualified, who now appearing in Court, are duly sworn and empaneled as the board of commissioners herein.

And the Court directs the said Board of Commissioners to examine personally all property claimed to be damaged by the proposed grading as well as that to be assessed with benefits in this proceeding before making its report, and to return into court at the aforesaid court room on Monday, the 29th day of March, 1915, at 9:30 o'clock in the morning of said day; to which time and place, for good cause shown, it is ordered that this proceeding be and it now is adjourned, for trial.

On the 11th day of the March Term, 1915, the same being March

19th, 1915, the following further proceedings were had and made of record, in cause No. 90627.

Comes Nannie B. Harper, Rachael Z. Furnish and Elizabeth H. Furnish and file herein their claims for damages.

On the 19th day of March Term, 1915, the same being March 29th, 1915, the following further proceedings were had and made of record in cause No. 90627.

Now on this 29th day of March, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division Numbered Nine (9), comes the said Kansas City, by its City Counselor, and come all persons and parties concerned herein; and comes also the board of commissioners herein.

[fol. 136] The trial of this cause is now had before the Court, and said board of commissioners, and all the claims for damages, the proofs and evidence, the instructions of the Court, the arguments of counsel, and all matters are fully heard.

Thereupon, the Court directs the said board of commissioners to return into Court at the aforesaid courtroom on Saturday, the 24th day of April, 1915, at 9:30 o'clock in the morning of said day, and to then and there render and deliver to the Court its report and verdict herein.

And for good cause shown, it is ordered that this proceeding be and now is adjourned to Saturday, April 24, 1915, at 9:30 o'clock in the morning of said day, at the aforesaid courtroom, for a verdict.

On the 41st day of the March Term, 1915, the same being April 24th, 1915, the following further proceedings were had and made of record in Cause No. 90627.

Now on this 24th day of April, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division numbered nine (9), comes the said Kansas City, by its City Counselor, and come all persons and parties concerned in this proceeding; and comes the board of commissioners herein.

And the said Board of Commissioners now renders and delivers to the Court its report and verdict herein, which report and verdict is now filed.

On the 44th day of the March Term, 1915, the same being April 28th, 1915, the following further proceedings were had and made of record in Cause No. 90627.

Comes Now Thomas H. Swope, defendant herein, and files his motion to set aside the verdict of the board of commissioners filed herein and grant a new trial hereof; also his motion in arrest of judgment.

[fol. 137] On the 45th day of the March Term, 1915, the same being April 29th, 1915, the following further proceedings were had and made of record in Cause No. 90627;

Comes now R. W. Hooker, defendant herein, and files his motion to set aside the verdict of the board of commissioners herein and grant a new trial hereof.

On the 6th day of the May Term, 1915, the same being May 15th, 1915, the following further proceedings were had and made of record in Cause No. 90627.

Now on this 15th day of May, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division numbered Nine (9), comes the said Kansas City, by its City Counselor, and come all persons and parties concerned herein.

And the motion of defendant Thomas H. Swope to set aside the judgment rendered herein, and grant a new trial hereof, is by the court taken up, heard, considered and sustained, for the reason the verdict of the board of commissioners herein was against the evidence and the damages allowed inadequate; to which ruling of the Court the said Kansas City now duly excepts and objects.

And the motion of the said Thomas H. Swope in arrest of judgment, is now by the Court taken up, heard, considered and overruled; to which ruling of the Court the said Thomas H. Swope now duly excepts and objects.

And the motion of defendant, R. W. Hoeker, to set aside the verdict herein rendered and grant a new trial hereof, is now by the Court taken up, heard, considered and sustained, for the reason the verdict of the board of commissioners herein was against the evidence, and the damages allowed inadequate; to which ruling of the court the said Kansas City now duly excepts and objects.

[fol. 138] Thereupon, it is ordered by the Court that the verdict of the Board of commissioners rendered herein on the 24th day of April, 1915, be, and the same is set aside and held for naught.

And for good cause shown, it is further ordered that this proceeding be and it now is adjourned to Saturday, the 22nd day of May, 1915, at 9:30 o'clock in the morning of said day, at the aforesaid courtroom, to empanel a board of commissioners herein.

And comes B. T. Whipple, and files herein his affidavits.

On the 12th day of the May Term, 1915, the same being May 22nd, 1915, the following further proceedings were had and made of record in Cause No. 90627.

Now on this 22nd day of May, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division numbered Nine (9), comes the said Kansas City by its City Counselor, and come all parties and persons concerned herein.

Thereupon, the Court duly chooses as the board of commissioners herein, William A. Wilson, Frank Updegraff, S. H. Hogsett, George H. Devo, John T. Sears and C. A. Cowan, six good and lawful men, disinterested freeholders in the said Jackson County, well qualified, who now appearing in Court, are duly sworn and empaneled as the Board of commissioners herein.

And the Court directs the said board of commissioners to examine personally all property claimed to be damaged by the proposed grading, as well as that to be assessed with benefits in this proceeding before making its report, and to return into Court at the aforesaid courtroom on Wednesday, the 2nd day of June, 1915, at 9:30 o'clock in the morning of said day, to which time and place, for good cause shown, it is ordered that this proceeding be and it now is adjourned, for trial.

[fol. 139] On the 20th day of the May Term, 1915, the same being

June 2nd, 1915, the following further proceedings were had and made of record in Cause No. 90627.

Now on this 2nd day of June, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division numbered Nine (9), comes the said Kansas City by its City Counselor, and come all persons and parties concerned herein; and comes also the board of commissioner- herein.

And for good cause shown, it is ordered that this proceeding be and it now is adjourned to Monday, the 14th day of June, 1915, at 9:30 o'clock in the morning of said day, at the aforesaid courtroom, for trial.

On the 30th day of the May Term, 1915, the same being June 14th, 1915, the following further proceedings were had and made of record in Cause No. 90627.

Now on this 14th day of June, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division numbered Nine (9), comes the said Kansas City by its City Counselor, and come all persons and parties concerned herein; and comes also the board of commissioner- herein.

And a trial of this cause is now had before the said Board of Commissioners and the Court, and all the claims for damages, the proofs and evidence, the instructions of the Court, the arguments of counsel, and all matters are fully heard.

And the Court thereupon, directs the said Board of Commissioners to return into Court at the aforesaid courtroom on Monday, the 21st day of June, 1915, at 9:30 o'clock in the morning of said day, and to then and there render and deliver to the Court its report and verdict herein.

[fol. 140] And for good cause shown, it is ordered that this proceeding be and it now is adjourned to Monday, June 21, 1915, at 9:30 o'clock in the morning of said day, at the aforesaid courtroom, for a verdict.

On the 35th day of the May Term, 1915, the same being June 21st, 1915, the following further proceedings were had and made of record, to-wit: Cause No. 90627.

Now on this 21st day of June, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division numbered Nine (9), comes the said Kansas City by its City Counselor, and come all persons and parties concerned herein, and comes also all persons and parties concerned herein, and comes also the board of commissioners herein.

And the said board of commissioners now renders and delivers to the Court its report and verdict in this proceeding, which report and verdict is duly filed.

On the 38th day of the May Term, 1915, the same being June 24th, 1915, the following further proceedings were had and made of record in Cause No. 90627.

Now comes Thomas H. Swope, defendant herein, and files his motion for a new trial hereof, also his motion in arrest.

On the 46th day of the May Term, 1915, the same being July



10th, 1915, the following further proceedings were had and made of record in Cause No. 90627.

Now on this 10th day of July, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division numbered Nine (9), comes the said Kansas City by its City Counselor, and come all persons and parties concerned herein.

[fol. 141] And the motion of Thomas H. Swope, defendant herein, to set aside the verdict of the jury herein on the 21st day of June, 1915, and grant a new trial hereof, is by the Court taken up, heard, considered and overruled, to which ruling of the Court the said Thomas H. Swope now duly excepts and objects.

And the motion of the said Thomas H. Swope in arrest of judgment herein, now by the Court taken up, heard, considered and overruled, to which ruling of the Court the said Thomas H. Swope now duly excepts and objects.

On the 47th day of the May Term, 1915, the same being September 11th, 1915, the following further proceedings were had and made of record, in Cause No. 90627.

Now on this 11th day of September, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division numbered Nine (9), comes the said Kansas City by its City Counselor, and come all persons and parties concerned herein.

And all motions to grant a new trial hereof; all motions in arrest of judgment herein having been by the Court overruled and excepted to, and no cause to the contrary now appearing, it is considered, adjudged and decreed by the Court that the verdict of the Board of Commissioners filed herein on the 21st day of June, 1915, be, and the same hereby is in all things confirmed and approved; and said verdict is by the Court adjudged to be binding and conclusive upon each and all of the person and parties concerned in this proceeding, and upon each and all of the persons and parties holding under them, or either or any of them.

[fol. 142] It is further ordered by the Court that said verdict be entered upon the records of this court, which is now here done, in the words and figures following, to-wit:

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, DIVISION  
No. 9

No. 90627

In the Matter of Grading of Meyer Boulevard from the West Line of  
Swope Parkway to the East Line of the Paseo

#### REPORT OF COMMISSIONERS

The undersigned, freeholders of Kansas City, State of Missouri, having been heretofore duly appointed Commissioners to estimate whether any, and if any, how much damage will be caused claimants herein by reason of the grading of said Meyer Boulevard in said City, as provided by Ordinance of Kansas City No. 21831, entitled:



"An Ordinance to grade Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, and to condemn easements to support embankments or fills, describing the nature of the improvement, providing how the cost thereof shall be paid, and prescribing the limits within which private property is deemed benefited by the proposed improvement, and assessed and charged to pay damages caused by said grading, and assessed and charged to pay the cost of said improvement," and to provide for the payment of such damages, if any, by the assessment of benefits, submit this report;

Having first been duly sworn to perform the duties justly and impartially and to make a true report; and having examined personally each piece of property described on the plat offered in evidence, and all property claimed to be damaged by the proposed grading of said boulevard, we find the actual damage to each piece of property, for which a claim for damages has been filed, either for and on account of said proposed grading, or for or on account of [fol. 143] the proposed easement, does not exceed the peculiar benefits to said property by reason of the proposed grading, and we, therefore, report no allowance of damages to any piece of property.

Wm. A. Wilson, George H. Devol, Frank Updegraff, Samuel H. Hogsett, John T. Sears, Arthur C. Cowan. Five (5) days' service.

It is now, therefore, considered, adjudged and decreed by the Court, that no person or party recover any damages on account of the grading of said Meyer Boulevard from the west line of Swope Parkway to the East line of The Paseo, and the condemnation of necessary easements, under this proceeding; that all parties and persons be, and they hereby are forever precluded from making any other or further claims for such damages.

It is further ordered that the Board of Commissioners be allowed five days' service herein and discharged; that Kansas City, Missouri, pay all costs of this proceeding.

STATE OF MISSOURI,  
County of Jackson, ss:

I, James B. Shoemaker, Clerk of the Circuit Court, within and for the County and State aforesaid, do hereby certify that the foregoing is a full, true and complete copy of all record entries in the Matter of the proceedings under o. of Kansas City, Missouri, No. 21831, approved January 26, 1910, entitled: "An Ordinance to Grade Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, etc." as the same appears of record in my office, in Condemnation Records No. 9 at Pages No. 335-355-392-395-401-404-414-436-438-440-439-546-553-595-605-606-622 and No. 10 at Page No. 28.

In witness whereof, I hereunto set my hand and affix the seal of [fol. 144] said Circuit Court, at office in Kansas City, this 12th day of April, A. D. 1917.

James B. Shoemaker, Clerk, By ———, Deputy.

[fol. 145] J. C. PETHERBRIDGE, being duly sworn and examined on behalf of the Complainants testified as follows:

I am one of the Assistant City Counselors of Kansas City, Missouri, and as such handle the condemnation and grading proceedings that come under the jurisdiction of the Board of Public Works. I have been Assistant City Counselor for over eight years and during all of that period have personally conducted proceedings for the grading of streets as provided under Section 3 of Article VIII of the Charter, that is the ordinary grading proceedings. I have also conducted proceedings under Section 28 of Article VIII of the Charter. I have filed probably as many as a thousand proceedings under Section 3 of Article VIII. During that same period probably 10 or a dozen or probably more proceedings have been conducted under Section 28 of Article VIII. I have handled quite a number of these myself and a few have been handled by the attorney for the Park Board. All of the big heavy grading cases are conducted under Section 28.

The Charter provides that in cases where the grading and cutting away of earth and rock is so great as to impose too heavy a burden upon the ordinary district as provided in section 3 the Council may upon recommendation of the Board of Public Works provide for the enlarged district under Section 28. This is done only where there is a heavy grading as there was in the Sixth Street Grading case. In that case there was at one point a cut away of about 41 feet. Sixth Street was graded from old Bluff Street to Broadway by taking off 40 feet on the south side of the bluff in some places; in other places the cut was not so great. The 23rd Street Trafficway proceedings are all through but the grading has not yet been done. [fol. 146] The contract for the grading of 23rd Street has not yet been let but when it is the tax bills will be spread over a large district created under Section 28 of Article VIII. My recollection is that the taxing district provided for in connection with the 23rd Street grading is the same as the taxing district provided for in the condemnation of land for that proceeding. The same plan was followed or contemplated in connection with the grading of McGee Street from Admiral Boulevard to 8th Street and in connection with the grading of 8th Street from Grand Avenue to Oak.

The plan followed in the grading of Main Street just south of Union Station was the old plan under Section 3 of Article VIII where the taxing district extended back approximately 150 feet. That was a great mistake. In that proceeding the property was almost confiscated and ever since that time the City has used this other plan. That was one of the largest grading projects ever undertaken by the City. The depth of the cut there at the highest point was 76 feet. The street was graded for a distance of three or four blocks.

On cross-examination Mr. Petherbridge testified as follows:

In all of the proceedings taken by the City under Section 28 of Article VIII the title and form of the petition in the Circuit Court

suit has been substantially the same. I don't mean the exact wording but I do mean that we get them up and file them in the same form. This proceeding was one of the first ones prepared. In all the subsequent proceedings under Section 28 we have followed the same form substantially.

This was one of the first proceedings. We had this sad experience on the Main Street cut to which reference has been made; that was [fol. 147] a tremendous cut out there, a tremendous tax on the abutting property and after making a study of the situation we concluded after thoroughly investigating matters that that was inequitable, that the people living south and the people living north got the benefit of the grading of that street as a main thoroughfare through the town, and we concluded that when other grading cases came on we would endeavor to adopt this other form of taxation because it was more equitable and the newer form has been followed in the big cases.

HERBERT V. JONES, being duly sworn and examined on behalf of the Complainants testified as follows:

I have lived in Kansas City 25 years and have been engaged in the real estate business here 20 years. I have tried to keep in touch with the general situation as to real estate activities and am familiar with real estate values and the values of property generally. I have just served two terms as President of the Real Estate Board of Kansas City and am now chairman of the City Planning Commission. The duties of that commission are rather varied. We are making a study of the entire city in reference to zoning it for business, industrial and residence areas. We also have referred to us all of the plats contemplated for filing. The Commission is an official commission provided for by ordinance and appointed by the Mayor. I have had occasion from time to time to become familiar with various public projects that have been inaugurated here, such as trafficways and the condemnation of land for memorial purposes and for parks and boulevards and have served as City witness for the Park Board in a [fol. 148] number of these projects. I was one of the City's witnesses in the last condemnation proceeding to condemn land for Memorial Park. I have served on condemnation juries at times.

I have made a study of the benefit district provided for the grading of Meyer Boulevard from Brooklyn to Swope Park and have been over the property itself. The traffic over the boulevard is very largely from the City at large. Swope Park is the public play-ground of the City and on the days when the public is using that play-ground Meyer Boulevard is congested. Swope Park contains an extensive system of driveways, walks, lakes, lagoons, ball grounds, tennis courts and zoological museum and groves. As many as fifty to seventy-five thousand people probably frequent Swope Park on a single day Sundays and Holidays.

The other boulevards of the City empty into Meyer Boulevard. I think that without question the property within Swope Park receives special benefit by reason of the grading of Meyer Boulevard.

(This testimony was admitted in evidence over the objection of defendants made at the time.) I think there is no question but that Swope Park is the greatest beneficiary by far in this entire proceeding. I think the entire purpose of the proceeding is to establish a connection between other parts of the city and Swope Park.

I think that considerable of the benefit from the grading of Meyer Boulevard accrued to the property lying south of Meyer Boulevard because the boulevard afforded an outlet to that property to the commercial district of the City. I think that Tracts 14 and 15 receive very little if any special benefit. They have an outlet on Prospect Avenue and on 63rd Street. It would not be the natural tendency of anyone to start away from the City in order to get to it.

From the corner of 63rd Street and Prospect Avenue to the Paseo [fol. 149] along 63rd Street is a distance of about one mile or perhaps three quarters of a mile. The distance from the corner of 63rd Street and Brooklyn to the Paseo is about half a mile. The Paseo is one of the main boulevard thoroughfares that leads to the downtown district.

I think the special benefits, if any, which accrued to Tract 11 from the grading of Meyer Boulevard were very remote. I would say that Tract 2 received absolutely no benefit from the grading. Tract 2 has a frontage on 63rd Street and Swope Parkway and at one time Swope Parkway was the main thoroughfare to the Park. After the establishment of Meyer Boulevard it became almost a side street. The same is true with respect to Tract 3 except that the effect has not been so marked. I should imagine that the south end of Tract 3 may have received some benefit from the improvement because it is close to the entrance of Swope Park, but as you go north the benefit rapidly disappears. I think that the special benefits, if any, received by Tract 8 would be small.

It would be rather difficult to state the exact amount of benefit to these tracts in dollars and cents, but I would say that the amount assessed against the property is not at all commensurate with the benefits received. By this I mean that the benefits are far less than the amount of the tax.

Q. Are you able to say as a real estate man after this improvement, consisting of the grading of Meyer Boulevard, was completed these Tracts 14 and 15, or either of them, could have been sold on the market for substantially any more money than they could have before?

A. I don't think so.

Q. Is that true of the other tracts referred to here, Tracts 2, 3, 8 and 11?

A. Yes, I think that is true.

[fol. 150] Q. What, in your opinion, is the situation as to whether Sixty-third Street as a street has been improved or injured by the putting through of Meyer Boulevard?

A. I think Sixty-third Street has been injured.

Q. Has it, in your opinion, really put it into a class of a side street?

A. That is practically what it is now.

Q. Whereas before was it on one of the principal thoroughfares leading from the southwest part of the city over towards Swope Park?

A. Yes, formerly traffic in that part, in that section went across Sixty-third Street and then to the park.

Q. Isn't it true that since Meyer Boulevard has been put through that the traffic that formerly went over Sixty-third Street almost altogether, if not entirely, goes over Meyer Boulevard to the park?

A. That is my judgment, yes.

Q. I want to ask you about the property fronting on Sixty-third Street for a distance back from the street line of 150 feet and I call your attention to that property as compared with property fronting on the boulevard of the same depth; I wish you would state in your opinion how the special benefits, if any, to the property fronting on Sixty-third Street resulting from this improvement compared to the special benefit, if any, resulting to the property fronting on the boulevard?

Mr. Bowersock: I make the same objection to this comparative testimony.

The Court: Well, I will hear the evidence.

To which last action and ruling of the Court, the Defendants, and each of them, by their counsel, at the time duly excepted, and still except.

A. I would say the property facing on Sixty-third Street 150 feet in depth is not enhanced in value at all by this proceeding, whereas [fol. 151] on Meyer Boulevard it certainly created a market for it as is evidenced by the fact that it has been platted and sold.

Q. When I asked you about the property lying south of the boulevard awhile ago I don't believe I asked you how far south of the boulevard, in your judgment, was the property specially benefited by reason of the proposed improvement; can you state that to the Court?

A. I think all the property south of this improvement that was accessible to the use of it.

Q. Well, can you give us some kind of idea as to how far that would extend, as to whether it would be blocks or miles or can you give us some idea about that?

A. Well, probably at least to Seventy-fifth Street; south of that it might go over to South Paseo and then come into Meyer Boulevard a little further down.

Since the improvement has been made the property abutting on the Boulevard has been platted and streets provided for. I have these plats here with me.

Whereupon the Complainants offered in evidence the plats referred to and over the objections of the defendants they were admitted in evidence as Plaintiff's Exhibits 25, 26, 27, which exhibits are hereto attached and made a part of this record.

The special benefits accruing to the property either north or south of the Boulevard naturally decrease as you get away from the improvement I think.

On cross-examination Mr. Jones testified as follows:

Most of the property lying north of Meyer Boulevard is high, slightly ground and all unplatted. The greater part of it is fine residence property. Of the property in the benefit district south of the Boulevard at Prospect the land is about on a level. At 67th Street [fol. 152] it is probably higher than Meyer Boulevard. As you go east it gradually slopes off toward 67th Street. The elevation of the various tracts varies in comparison with the Boulevard. There is quite a little of the property from 10 to 20 feet below the Boulevard. The property south of 67th Street is platted and built up. Part of it is made up of rather small unpretentious houses.

[fol. 153] This is the part immediately south of Tract 6. Further west in Glenheim addition some very substantial houses are being built. This adjoining Prospect just east and west of Prospect Avenue.

In certain instances the tendency in Kansas City is now for the best residences rather to recede from the publicity of the boulevard, however, along Ward Parkway and the other great boulevards through the Country Club District are some of the handsomest homes, and the property along Linwood Boulevard and Armour Boulevard is of much greater value than on the streets farther back. It is true, however, that along Ward Parkway and the other Country Club boulevards the residences have been very carefully restricted and the residences back from the boulevards a block or two are in many instances larger and more pretentious than those on the Parkway itself. The highest priced property in the Country Club District is along Ward Parkway.

The establishment of Ward Parkway has, of course, benefited all of the property out there. It is of benefit to it specially as different from the benefit to other property in other parts of the City.

In the same manner the Abernathy tracts received a special benefit from the establishment of The Paseo, a different benefit from what might have been gained by the residence of my brother, Mr. Elliot Jones, out northeast. All property in the immediate neighborhood of all of these boulevards improvements in Kansas City has in most instances been especially benefited by those improvements.

These plats of Park Gate addition which have been offered in evidence were submitted to the City Planning Commission. We had the City Engineer and our engineer go over the plats and they said that the grades of the streets running into Meyer Boulevard would not be prohibitive. That is the grades up Askew Avenue, and Bales [fol. 154] Avenue, would not be prohibitive. We would not approve the plat and the Board of Public Works would not have approved it unless provision had not been made for linking up the streets with Meyer Boulevard.

Mr. Palmer: Isn't it a fact that the building of boulevards and the laying out of boulevards in a new district especially in unplatted lands tends to fix the value of the property in the whole district and not just immediately adjoining the boulevard?

Witness:

A. That is rather hard to substantiate.

Mr. Palmer: Take Gladstone Boulevard, take Ward Parkway, hasn't it been the tendency of those boulevards to elevate the value of the land on both sides?

Witness: I think the whole boulevard system has certainly justified itself.

On Re-Direct Examination Mr. Jones testified as follows:

The lots in Park Gate addition which were platted and sold, sold from \$15.00 to \$20.00 a foot, or possibly some of it for less, where the property was below grade. The property on the side streets ranged from \$8.00 to \$10.00 to \$12.00 per foot. (This evidence admitted over defendant's objection). It is considered that there are about 250 front feet to the acre. \$10.00 a front foot is \$2,500.00 an acre; \$20.00 a front foot would be \$5,000.00 per acre.

There is an old pond about in the center of Tract 2. The tract is rather low and there has been considerable water there. Leading out from there towards the south are a number of more or less deep gullies. Quite a large portion of this tract is below the grade of 63rd [fol. 155] Street and much below the grade of the surrounding territory.

With reference to Tract 11 the northwest corner of it, just at the southeast corner of 63rd and Prospect, is low ground for quite a distance south and east. There is a deep ravine running from 63rd Street in a southwesterly direction to a corner of the property. It is below 63rd Street and a good deal below Prospect. All of the tract is vacant ground.

#### STIPULATION FOR SUBSTITUTION OF PARTIES:

It was thereupon agreed and stipulated by the consent of all parties that B. Haywood Hagerman might be substituted as Plaintiff in the place of Bert Steeper, Bert Steeper having conveyed the tract in question to B. Haywood Hagerman, and that the suit might be prosecuted in the name of B. Haywood Hagerman in the same manner and to the same extent as though it had been brought by him originally.

It is further admitted by the defendants that Mr. Riddle, President of the Evanston Park Realty Company, which was the owner of the property at the time of the institution of the grading proceedings, would, if present, testify that the company had no knowledge of said proceeding that is, no actual knowledge of said proceeding, and that the first it knew of it was when the company officials went to renew or extend the loan on the property. At that time they learned for the first time of this special assessment of \$12-511.60 against the property.

Thereupon the Plaintiffs rested.



And thereupon, to sustain the issues on their part the defendants offered the following oral and documentary evidence.

Defendants offered in evidence the petition filed in the Circuit Court of Jackson County, Missouri, in Cause No. 90628 in that Court. This petition was admitted in evidence over the objection of the plaintiffs as Defendants' Exhibit "C". Said Exhibit "C" is substantially as follows:

EVIDENCE: DEFENDANT'S EXHIBIT "C"

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY, JANUARY TERM, 1915

No. 90628

In the Matter of the Grading of Meyer Boulevard from the West Line of Swope Parkway to the East Line of the Paseo under Ordinance of Kansas City, Missouri, No. 21831, Approved January 26, 1915

Petition

Comes now Kansas City, Missouri, by A. F. Evans, City Counselor, and Jay M. Lee, Assistant City Counselor, and alleges that an ordinance of Kansas City, Missouri, No. 21831, was duly passed by the Common Council of said City, and was approved by the Mayor of said City on January 26, 1915, that said Ordinance No. 21831 is in words and figures as follows, to-wit:

[fol. 156] And a certified copy of said ordinance marked Exhibit "A" is filed herewith, attached hereto, and made a part hereof; that by said ordinance provision is made for the work specified in said ordinance to be done, and for the payment for same by special tax bills to be charged as a special tax on parcels of land (exclusive of improvements thereon) benefited thereby, (after deducting the portion of the whole cost, if any, which the city may pay) within the limits of the benefit district prescribed and determined by said ordinance; and the limits of said benefit district within which it is proposed to assess property for the payment for said work, are as hereinbefore defined and set forth as in Sections 4 and 6 of this ordinance.

Kansas City further states and alleges that plans and specifications for the work specified and provided for in said ordinance were duly approved and adopted by the Board of Public Works and by the Board of Park Commissioners as set forth in said ordinance; and that after the passage of said ordinance an approximate estimate of the cost of said work was made by the Board of Public Works, as provided by law, and duly made of record by said Board on the 9th day of February, 1915, by its Resolution under Entry No. 75143, which said approximate estimate was duly approved and adopted by the Board of Park Commissioners on the 9th day of February, 1915, by its Resolution No. 1855; and a copy of said

Resolutions showing said approximate estimate of the cost of said work, are filed herewith, attached hereto, and made a part hereof, marked Exhibits "B" and "C" respectively.

Kansas City also prays the court to find and determine the validity of said ordinance, and the question of whether or not the respective tracts of land within said benefit district shall be charge<sup>d</sup> [fol. 157] with the lien of said work in the manner provided by said ordinance; and that the Court make an order appointing a day and place for a hearing on the matters referred to in this petition, and also for an order of publication and service according to law.

Kansas City, By A. F. Evans, City Counselor. Jay M. Lee, Ass't City Counselor.

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[fol. 158] Along with said Petition, Defendants offered in evidence the Exhibits which were attached to and filed with the Petition in the Circuit Court proceeding, one of said exhibits being Ordinance of Kansas City, No. 21831, already introduced in evidence, the other being a Resolution of the Board of Public Works of Kansas City, No. 75143. This Resolution was admitted in evidence over the Plaintiffs' objection as Defendants' Exhibit "D." It is substantially as follows:

[fol. 159] EVIDENCE: DEFENDANTS' EXHIBIT "D"

Document No. 75143

February 9, 1915.

The Board of Public Works adopted the following Resolution:

In the matter of the grading of Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, under Ordinance of Kansas City, Missouri, Numbered 21831, approved January 26th, 1915.

Whereas, by ordinance of Kansas City, Missouri, Numbered 21831, approved January 26th, 1915, entitled, "An Ordinance to grade Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, and to condemn easements to support embankments or fills, describing the nature of the improvement, providing how the cost thereof shall be paid, and prescribing the limits within which private property is deemed benefited by the proposed improvement, and assessed and charged to pay damages caused by said grading, and by the condemnation of said easements, and assessed and charged to pay the cost of said improvement" provision was made for the grading of a portion of Meyer Boulevard and for payments of the cost of said work as set forth in said ordinance, and

Whereas, as required by law, an approximate estimate of the cost of the work provided for in said ordinance has been made by this Board, now therefore,

Be it resolved by the Board of Public Works of Kansas City, Missouri: That it does hereby adopt said approximate estimate of

the cost of said work, said approximate estimate, as completed, being as follows; to-wit:

[fol. 160]

Earth Embankment,	320,100 cu. yds., at .25.....	\$80,025.00
Rock Excavation,	4,800 " " at .90.....	4,320.00
15" Drain Pipe,	290 Lin. ft. at .65.....	188.50
12" " "	820 at .50.....	410.00
		<hr/>
		\$84,943.50

Ayes: Gallagher, Hays and Webster.

I, F. E. McCabe, Secretary of the Board of Public Works of Kansas City, Missouri, hereby certify that the annexed and foregoing is a true and correct copy of a resolution adopted by the Board of Public Works in the matter of the grading of Meyer Boulevard from the west line of Swope Parkway to the east line of the Paseo, under Ordinance of Kansas City, Missouri, No. 21831, approved January 26th, 1915, as the same appears of record and on file in the records of Official Proceedings of the Board of Public Works, Volume No. 31, at Page 144, in this office.

In testimony whereof, I have hereunto set my hand and affixed the official seal of the Board of Public Works on the 26th January 1921.

F. E. McCabe, Secretary Board of Public Works, Kansas City, Missouri.

[fol. 161] Defendants also offered in evidence a Resolution of the Board of Park Commissioners of Kansas City, No. 1855, which was admitted in evidence by the Court over Plaintiffs' objection as Defendants' Exhibit "E." Said Exhibit is substantially as follows:

[fol. 162] EVIDENCE: DEFENDANTS' EXHIBIT "E"

Tuesday, Feb. 9, 1915.

No. 1855. On motion of Mr. Lechtman seconded by President Craver the following resolution was adopted:

Be it resolved by the Board of Park Commissioners of Kansas City, Missouri:

That the approximate estimate of the grading of Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, as adopted by resolution of the Board of Public Works by Entry Number 75143, and as provided for under ordinance Number 21831, approved January 26, 1915, said estimate being in the total sum of \$84,943.50, be and the same is hereby adopted, approved and entered on record in this office the Board of Park Commissioners on the 9th day of February, 1915.

Ayes: Lechtman and Craver. Absent: Dr. Logan. 2 Ayes.

[fol. 163] Defendants thereupon offered in evidence a certified copy of the record entries in Cause No. 90628, in the Circuit Court of Jackson County, Missouri. Their admission was objected to on behalf of the Plaintiffs on the ground that they were not material to any issue in the case and for the additional reason that it appears on the fact of the Circuit Court proceedings that the case in the Circuit Court was not of the kind or character authorized under the Constitution or Laws of the State of Missouri.

Said record entries were admitted in evidence by the Court as Defendants' Exhibit "F". Said Exhibit is substantially as follows:

[fol. 164] EVIDENCE: DEFENDANTS' EXHIBIT "F"

Be it remembered that on the 33rd day of the regular January Term, 1915, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 17th day of February, 1915, the following proceedings were had and made of record before Hon. Thomas J. Seehorn, presiding Judge of Assignment Division, in the cause entitled

Assignment Division

No. 90628

In the Matter of the Grading of MEYER BOULEVARD from the West Line of Swope Parkway to the East Line of the Paseo under Ordinance of Kansas City, Missouri, No. 21831, Approved the 26th Day of January, 1915

Now comes Kansas City, Missouri, by its Assistant City Counselor, Jay M. Lee, and files with the Court a certified copy of the aforesaid ordinance; also a map or plat descriptive of said proceeding.

Thereupon, it is ordered by the Court that this proceeding be and now is assigned to Division numbered Nine (9) of this Court, for further hearing herein.

On the 33rd day of the January Term, 1915, the same being February 17th, 1915, the following further proceedings were had and made of record, to-wit:

33rd Day in Division 9

Wednesday, February 17th, 1915.

In the Matter of the Grading of Meyer Boulevard from the West Line of Swope Parkway to the East Line of the Paseo under Ordinance of Kansas City, Missouri, No. 21831, Approved January 26, 1915. Division 9. No. 90628

Now on this 17th day of February, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division No. 9, [fol. 165] comes Kansas City, Missouri, by A. F. Evans, City

Counselor, and Jay M. Lee, Assistant City Counselor, and files its petition alleging the passage and approval of its Ordinance No. 21831, approved January 26, 1915, and that plans and specifications for the work specified and provided for in said ordinance has been duly approved and adopted as set forth in said ordinance, and that after the passage of said ordinance an approximate estimate of the cost of said work was duly made by the Board of Public Works, as provided by law, and duly made of record by resolution, and approved and adopted by the Board of Park Commissioners by resolution, and that copies of said resolution, showing said approximate cost, and of said Ordinance, No. 21831, were filed with and made a part of said petition, and praying that the Court find and determine the validity of said ordinance, and the question of whether or not the respective tracts of land within the benefit district named in said ordinance shall be charged with the lien of said work in the manner provided by said ordinance and the Court thereupon makes the following order, to-wit:

To all persons whom it may concern, Greeting:

Whereas, Kansas City, Missouri, has filed in this Court its petition alleging the passage and approval of its ordinance No. 21831, approved January 26, 1915, and that plans and specifications for the work specified and provided for in said ordinance has been duly approved and adopted by the Board of Public Works and by the Board of Park Commissioners, as set forth in said ordinance, and that after the passage of said ordinance an approximate of the cost of said work was made by the Board of Public Works, as provided by law, and duly made of record by resolution, and said approximate estimate was duly approved and adopted by the Board of Park Commissioners by resolution; and

Whereas, a copy of said resolution, showing said approximate estimate of the cost of said work was filed with said petition and made [fol. 166] a part thereof; and

Whereas, Kansas City filed with said petition, and made a part thereof, a certified copy of said ordinance No. 21831, approved January 28, 1915; and

Whereas, by said ordinance provision is made for the work specified therein to be done, and for the payment for parcels of land (exclusive of the improvements thereon) benefited thereby, (after deducting the portion of the whole cost, if any, which the city may pay) within the limits of the benefit district prescribed and determined by said ordinance; and the limits within such it is proposed to assess property for the payment for said work are as hereinbefore defined and set forth, in Sections 4 and 8 of said ordinance; and

Whereas, by its said petition Kansas City prays the Court to find and determine the validity of said ordinance and the question of whether or not the respective tracts of land within said benefit district shall be charged with the lien of said work in the manner provided by said ordinance.

Now, therefore, all and each of you are hereby notified that the 29th day of March, 1915, is the day, and the courtroom of this

Division No. 9 of said Court, in the County Court House in Jackson County, Missouri, at Kansas City, is the place hereby fixed by said Court for a hearing on the matters set forth in said petition, and when and where evidence may be offered tending to prove the validity or invalidity or lack of legality of said ordinance, and of said proposed lien against the respective lots, tracts and parcels of land within said benefit district sought to be charged with such lien, and when and where the court will determine the question of whether or not the said lots, tracts and parcels of land owned by each defendant should be charged with such lien.

[fol. 167] And the Court further orders that this order be published in each issue of The Daily Record, the newspaper at the time doing the City printing for Kansas City, Missouri, for four (4) successive weeks, the last insertion to be not more than one (1) week prior to the day hereinbefore fixed for said hearing.

And the Court further orders that the parties owning or having an interest in the real estate fronting on that part of the aforesaid Meyer Boulevard proposed to be graded under these proceedings, be served within said city with a copy of this order, either by delivering to each of such owners or parties interested at any time before the day fixed herein for the hearing aforesaid, a copy of this order, or by leaving such copy at their usual place of abode with some member of their respective families over the age of fifteen (15) years, and in case of corporation, by delivering a copy to the president or secretary or some managing officer thereof, or to any agent of such corporation in charge of any office or place of business of such corporation, as by the Charter of said city provided.

On the 19th day of March Term, 1915, the same being March 29th, 1915, the following further proceedings were had and made of record in Cause No. 90628:

Now on this 29th day of March, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division numbered Nine (9), comes the said Kansas City by its City Counselor, and come all persons and parties concerned herein.

And come Percy Brown and Gertrude P. Brown as owners of property affected by this proceeding and file herein their entry of appearance and answer.

And the said Kansas City now files and submits to the Court proof of lawful publications and personal service of the orders of [fol. 168] the Court herein made on the 17th day of February, 1915, and the Court finds that same were made as the law requires and deems no further notice herein advisable.

Thereupon, this cause coming on for trial, it is submitted to the Court upon the proofs and the evidence, and is by the Court taken under advisement.

On the 7th day of the May Term, 1915, the same being May 17th, 1915, the following further proceedings were had and made of record in Cause No. 90628:

Now on this day comes Kansas City, by its Assistant City Counselor, Jay M. Lee, and comes defendant Gertrude P. Brown by her attorney, J. G. Paxton, and come all parties in this proceeding.

And the Court having heard evidence in the case, and the arguments of counsel, and being fully advised and informed in the premises, finds, orders and adjudges that in all respects Ordinance of Kansas City, Missouri, Number 21831, approved January 26, 1915, entitled:

"An Ordinance to grade Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, and to condemn easements to support embankments or fills, describing the nature of the improvements providing how the cost thereof shall be paid, and prescribing the limits within which private property is deemed benefited by the proposed improvement, and assessed and charged to pay damages caused by said grading, and by the condemnation of said easements, and assessed and charged to pay the cost of said improvements,"

is valid and legal, and that a contract for the doing of the work provided for in said ordinance may be entered into by Kansas City in conforming with said Ordinance and as provided by the Charter and [fol. 169] Ordinance of Kansas City; and that the proposed lien of the assessments for the payment of the cost of the work provided for in said ordinance under such contract against the respective lots, tracts and parcels of said land within said benefit district owned by the respective defendants in these proceedings, and each of them respectively, when assessed, apportioned and charged as provided in said ordinance and the Charter of Kansas City, is and shall be a valid and legal lien; and that said lots, tracts and parcels of land within said benefit district owned by said defendants may be charged with such lien respectively.

On the 9th day of the May Term, 1915, the same being May 19th, 1915, the following further proceedings were had and made of record in Cause No. 90628:

Comes Gertrude P. Brown, defendant herein, and files her motion to grant a new trial hereof.

On the 42nd day of the May Term, 1915, the same being June 28th, 1915, the following further proceedings were had and made of record in Cause No. 90628:

Now on this 28th day of June, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division numbered Nine (9), comes the said Kansas City by its City Counselor, and come all persons and parties concerned herein.

And the motion of Gertrude P. Brown for a new trial of this cause, is now by the Court taken up, heard, considered and overruled, to which ruling of the Court the said Gertrude P. Brown duly excepts and objects.

[fol. 170] It was thereupon agreed between the parties that the reduced blue-print which had been introduced in evidence as Plaintiffs' Exhibit 12 might be used instead of the original plat filed in the Circuit Court proceedings, and that said Exhibit 12 might stand as the plat introduced in that proceeding except as to the yellow marks placed on the reduced plat by Mr. Woodward. It was agreed that



Exhibit 12 was filed in the Circuit Court in said Cause No. 90628 with the exception of the yellow marks.

Defendants thereupon offered in evidence the plans and specifications referred to in Ordinance No. 21831. These plans and specifications were admitted in evidence over the objections of the Plaintiffs as Defendants' Exhibit "G". Said Exhibit is substantially as follows:

[fol. 171] EVIDENCE: DEFENDANTS' EXHIBIT "G"

#### Approximate Estimate

Earth embankment .....	320,100 Cubic yards.
Rock excavation .....	4,800 Cubic yards.
Solid Rock excavation .....	— Cubic yards.
Rubble Masonry (Portland Cement Mortar) .	— Cubic yards.
Riprap .....	— Cubic yards.
15" inch pipe .....	290 Lineal feet.
12" inch pipe .....	820 Lineal feet.

Board of Park Commissioners of Kanass City, Missouri

Resolution No. 6230

Contract for Grading Meyer Boulevard from the West Line of Swope Parkway to the East Line of the Paseo

This contract, made and entered into this 26th day of October, 1915, by and between McMillan Contracting Company as principal and party of the first part, and E. E. Tutt and Fidelity & Deposit Company of Maryland, as sureties, parties of the second part, and Kansas City, party of the third part,

Witnesseth: That whereas, the said party of the first part is the lowest and best bidder, for making the following city improvements, viz:

Grading Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, to the full width and to the established grade of the same,

Now, therefore, the said party of the first part hereby agrees and binds himself, his heirs, executors, administrators and assigns, itself and its successors and assigns, to do and complete the work above mentioned in a substantial and workmanlike manner, within the time provided for in this contract, according to the plans and specifications for said improvement adopted, perfected and approved by the Board of Park Commissioners on the 11th day of December, 1914, by Resolution No. 1761, and on file in the office of said Board, which said plans and specifications are hereto attached and made a part of this contract, and to the satisfaction and acceptance of the Board of Park Commissioners of Kansas City. And the said party of the first part does hereby guarantee that the work herein men-

[fol. 172] tioned shall be completed without further compensation

than that provided for in this contract for the first cost of said work, and the acceptance of the work done hereunder and the issue of Special Tax Bills in payment therefor shall not be held to prevent the maintenance of an action on the Contractor's Bond for failure to complete the work in accordance with this contract and the plans and specifications for same.

In consideration of the completion by said party of all work embraced in this contract in conformity with the specifications hereto attached and stipulations herein contained, Kansas City, party of the third part, hereby agrees to pay to the said first party at the following rate, viz:

For each cubic yard of earth the sum of twenty-five and  $\frac{1}{2}$  cents (25½¢).

For each cubic yard of rock excavation the sum of eighty cents (80¢).

For each cubic yard of solid rock excavation, the sum of —.

For each lineal foot of fifteen (15) inch pipe, the sum of sixty-five cents (65¢).

For each lineal foot of twelve (12) inch pipe, the sum of fifty cents (50¢).

For each cubic yard of rip-rap, the sum of —.

For each cubic yard of Rubble Masonry, laid on Portland Cement Mortar, the sum of —.

In witness whereof, the said parties of the first and second parts have hereunto set their hands and seals respectively, and Kansas City executes this contract by its Board of Park Commissioners.

McMillan Contracting Co. (Seal), By D. E. McMillan, President. (Seal.) Fidelity & Deposit Company of Maryland (Seal), By James G. Guinotte, Attorney-in-fact. (Seal.) Attest: F. G. Tidmarch, Secretary. Kansas City, By Board of Park Commissioners of Kansas City, Mo., By Cusil Lechtman, President. Attest: T. C. Harrington, Secretary. (Seal.)

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City Comptroller's Office

Kansas City, Mo., Nov. 1, 1915.

The Sureties and Bond aforesaid are hereby approved as sufficient.  
M. A. Flynn, City Comptroller.

Office of Board of Park Commissioners

Kansas City, Mo., Nov. 2, 1915.

The foregoing Contract and Bond have this day been approved and affirmed by the Board of Park Commissioners, and the President and Secretary were ordered to execute the same on behalf of Kansas City, in the name of said Board of Park Commissioners.

[fol. 173] Witness my hand and seal of the said Board of Park Commissioners of Kansas City, Missouri, this 2nd day of November, 1915.

T. C. Harrington, Secretary.

City Clerk's Office

Kansas City, Mo., Dec. 9, 1915.

The foregoing Contract and Bond have been this day ratified, approved and confirmed by the Common Council of Kansas City by Ordinance No. 24693, approved Dec. 9, 1915.

Attest: J. A. Bermingham, City Clerk, By ———, Deputy.

Board of Park Commissioners of Kansas City, Missouri

Resolution No. 1761

Specifications for Grading Meyer Boulevard from the West Line of Swope Parkway to the East Line of the Paseo According to Plans on File in the Office of the Board of Park Commissioners of Kansas City, Missouri, as Above Specified, and to Its Full Width and to the Grade of Same.

**Excavation.**—Earth excavations shall be carried down on vertical lines, unless otherwise ordered by the Board of Park Commissioners. All material, however, which may slide or fall into the roadway from the sides of the excavation, prior to the final acceptance of the work, shall be removed and estimated as part of the material in the roadway proper.

**Embankments.**—Embankments shall be made of earth, or rock and earth. Where rock is used in the embankment, sufficient earth and fine material shall be used to thoroughly fill all interstices between the stones, but no rock will be permitted above a line two (2) feet below the finished surface of the lawn space, and twelve (12) inches below the finished surface of the roadway proper.

Embankments shall be carried up with a slope of one and one-half ( $1\frac{1}{2}$  foot horizontal to one (1) foot vertical, or with such rate of inclination as the Board of Park Commissioners shall deem necessary to maintain the embankment to its required height, width and shape; and when the estimate for work is made in embankment no [fol. 174] material shall be measured or paid for that lies outside of the line above specified.

Adopted and perfected this 11th day of December, 1914.

Board of Park Commissioners of Kansas City, Missouri, By  
C. C. Craver, President. Attest: T. C. Harrington, Secretary.

Adopted Dec. 11, 1914. Entry No. 73991.

Board of Public Works. B. L. Gregory, President. Attest:  
E. J. McDonnell, Secretary.

[fol. 175] Defendants thereupon offered in evidence the Resolution of the Board of Public Works No. 73991 which was admitted in evidence over plaintiffs' objection as Defendants' Exhibit "H." Said Resolution is in words and figures as follows:

[fol. 176] EVIDENCE: DEFENDANTS' EXHIBIT "H"

Document 73991

December 11, 1914.

The Board of Public Works now perfects, approves and adopts plans and specifications, being Documents numbered 73991, of the Board of Park Commissioners, providing for the grading of Meyer Boulevard, from the west line of Swope Parkway, to the east line of The Paseo, as provided by Resolution No. 1762.

Ayes: Gregory, Buckholz and Gallagher.

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[fol. 177] Defendants thereupon offered in evidence the proof of publication of the Order of Publication in Cause No. 90628 in the Circuit Court, which was admitted in evidence over Plaintiffs' objection as Defendants' Exhibit "I." Said Exhibit is substantially as follows:

[fol. 178] EVIDENCE: DEFENDANTS' EXHIBIT "I"

Order of Publication

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY, DIVISION NO. 9, JANUARY TERM, 1915

No. 90628

In the Matter of the Grading of MEYER BOULEVARD from the West Line of Swope Parkway to the East Line of the Paseo under Ordinance of Kansas City, Missouri, No. 21831, Approved January 26, 1915

Order

Now, on this 17th day of February, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division No. 9, comes Kansas City, Missouri, by A. F. Evans, City Counselor, and Jay M. Lee, Assistant City Counselor, and files its petition alleging the passage and approval of its Ordinance No. 21831, approved January 26, 1915, and that plans and specifications for the work specified and provided for in said Ordinance had been duly approved and adopted as set forth in said Ordinance, and that after the passage of said Ordinance an approximate estimate of the cost of said work was duly made by the Board of Public Works, as provided by law, and duly made of record by resolution, and approved and adopted by the

Board of Park Commissioners by resolution, and that copies of said resolution, showing said approximate cost, and of said Ordinance No. [fol. 179] 21831, were filed with and made a part of said petition, and praying that the Court find and determine the validity of said ordinance, and the question of whether or not the respective tracts of land within the benefit district named in said ordinance shall be charged with the lien of said work in the manner provided by said ordinance and the court thereupon makes the following order, to-wit:

To all persons whom it may concern, Greeting:

Whereas, Kansas City, Missouri, has filed in this Court its petition alleging the passage and approval of its Ordinance No. 21831, approved January 26, 1915, and that plans and specifications for the work specified and provided for in said ordinance had been duly approved and adopted by the Board of Public Works and by the Board of Park Commissioners as set forth in said Ordinance, and that after the passage of said Ordinance an approximate estimate of the cost of said work was made by the Board of Public Works, as provided by law, and duly made of record by resolution, and said approximate estimate was duly approved and adopted by the Board of Park Commissioners by resolution; and

Whereas, a copy of said resolution, showing said approximate estimate of the cost of said work were filed with said petition and made a part thereof; and

Whereas, Kansas City filed with said petition, and made a part thereof, a certified copy of said Ordinance No. 21831, approved January 26, 1915, which said Ordinance is in words and figures as follows, to-wit:

(Here follows ordinance No. 21831.)

[fol. 180] And,

Whereas, by said ordinance provision is made for the work specified therein to be done, and for the payment for same by special tax bills to be charged as a special tax on parcels of land (exclusive of the improvements thereon) benefited thereby, (after deducting the portion of the whole cost, if any, which the city may pay) within the limits of the benefit district prescribed and determined by said ordinance; and the limits within which it is proposed to assess property for the payment for said work are as hereinbefore defined and set forth, in Section- 4 and 6 of said Ordinance; and

Whereas, by its said petition Kansas City prays the Court to find and determine the validity of said ordinance, and the question of whether or not the respective tracts of land within said benefit district shall be charged with the lien of said work in the manner provided by said ordinance.

Now, therefore, all and each of you are hereby notified that the 29th day of March, 1915, is the day, and the Court room of this Division No. 9 of said Court, in the County Court House in Jackson County, Missouri, at Kansas City, is the place hereby fixed by said Court for a hearing on the matters set forth in said petition, and

when and where evidence may be offered tending to prove the validity or invalidity or lack of legality of said ordinance, and of said proposed lien against the respective lots, tracts and parcels of land within said benefit district sought to be charged with such lien, and when and where the Court will determine the question of whether or not the said lots, tracts and parcels of land owned by each defendant should be charged with such lien.

And the Court further orders that this order be published in each issue of The Daily Record (the newspaper at the time doing the city printing for Kansas City, Missouri,) for four (4) successive weeks, the last insertion to be not more than one (1) week prior to the day hereinbefore fixed for said hearing.

[fol. 181] And the Court further orders that the parties owning or having an interest in the real estate fronting on that part of the aforesaid Meyer Boulevard proposed to be graded under these proceedings, be served within said City with a copy of this order, either by delivering to each of such owners or parties interested at any time before the day fixed herein for the hearing aforesaid, a copy of this order, or by leaving such copy at their usual place of abode with some member of their respective families over the age of fifteen (15) years, and in case of corporation, by delivering a copy to the President or Secretary or some managing officer thereof, or to any agent of such corporation in charge of any office or place of business of such corporation, as by the Charter of said City provided.

A true copy of the original order.

Witness my hand and seal of said Court this 17th day of February, 1915.

James B. Shoemaker, Clerk of the Circuit Court of Jackson County, Missouri, By E. L. Swope, Deputy. (Seal.)

(Personal)

I hereby certify that I executed and served the within order and notice in Kansas City, Missouri, by delivering a copy thereof personally to each of the following owners and parties in interest within named.

On 1st day of March, 1915, to F. B. Heath, Jas. C. Leiter, Geo. A. Leiter, Gustav V. Bachman, Richard W. Hocker.

(Service of Chief Officer of Corporation)

I hereby certify that I executed and served the within notice in Kansas City, Missouri, on Evanston Golf Club (Lessee) by delivering a copy of said notice and order to I. H. Hettinger, he being the President and chief officer of said corporation, this 1st day of March, [fol. 182] 1915.

(Cannot be Found)

I further certify that service cannot be made of the within notice in Kansas City, Jackson County, Missouri, upon the following property owners and parties within named, either by delivering a copy

of such notice personally to such property owners and parties, or by leaving a copy at the usual place of abode of such property owners and parties with a member of their respective families over the age of fifteen years: Nannie R. Harper, Rachel Z. Furnish, Elizabeth H. Furnish, Thos. E. Swope, Jr.

Witness my hand this 4th day of March, 1915.

Wm. E. Kehoe, Police Officer, Kansas City, Mo.

### Affidavit of Publication

STATE OF MISSOURI,

County of Jackson, ss:

Elbert E. Smith, of Kansas City, Missouri, of lawful age, being duly sworn, says that he is one of the publishers of The Daily Record, a newspaper published daily, except Sundays, in Kansas City, Jackson County, Missouri, and that the notice to property owners, a true copy of which is hereto attached, was duly published in the daily edition of said newspaper for twenty-nine (29) days, beginning February 24, 1915, and in each of the issues thereafter, to and including March 29, 1915.

Elbert E. Smith.

Subscribed and sworn to before me this 29th day of March, 1915, and I certify that I am duly qualified as a Notary Public and that my term expires the 24th day of February, 1917. Harold A. Smith, Notary Public in and for Jackson County, Missouri.

Filed March 29, 1915. James B. Shoemaker, Clerk. E. T. Swope.

(Attached to said Affidavit of Publication is a printed order of publication, the same as the Order of Publication appearing in this Exhibit.)

[fol. 183] Defendants thereupon offered in evidence the Answer filed by Gertrude P. Brown in Suit No. 90628 in the Circuit Court, which was admitted in evidence over Plaintiffs' objections as Defendants' Exhibit "J." Said Exhibit is substantially as follows:

[fol. 184] EVIDENCE: DEFENDANTS' EXHIBIT "J"

In the Circuit Court of Jackson County, Missouri, at Kansas City,  
March Term, 1915

No. 90628

In the Matter of the Grading of MEYER BOULEVARD

Now come Percy Brown and Gertrude P. Brown and enter their appearance herein and state that they are the owners of the North half of the Northwest quarter of the Southeast quarter of Section



Three (3), Township Forty-eight (48) and Range Thirty-three (33) in Jackson County, Missouri, except a tract of one acre in the Northeast corner thereof, and that said real estate is contained in the benefit district which is sought to be taxed for the grading of said Meyer Boulevard.

Said parties state that they are the defendants herein and the owners of said property, and that said property does not abut on Meyer Boulevard; that the South line thereof is a quarter of a mile from said boulevard, and the north line thereof is a half mile from said Meyer Boulevard. Said defendants state that their property is not directly benefited by the opening of said boulevard, and is only remotely benefited, as all the other property in Kansas City is. That the property of defendants, above described, lines on one boulevard, to wit: Swope Parkway, upon which is operated a street car line, and it can derive no particular and special benefit from the grading of said Meyer Boulevard. That the grading of said boulevard will greatly enhance the value of the property abutting on said boulevard, and yet, in the apportionment of the cost of said grading, the property of said defendants, fronting on said Swope Parkway, may be assessed at as great a sum as the property on said Meyer Boulevard, and the effect would be that the special tax levied thereunder against the property of defendants may equal, acre for acre, the special tax assessed against the property immediately benefited, to wit: the property abutting on said Meyer Boulevard.

Defendants further state, that for the reasons, aforesaid, it would be illegal and improper for the court to declare this ordinance valid, and it would also be illegal for the reason that on its face thereof, the charter provision authorizing this proceeding is void, for the reason that it violates the Constitution of Missouri, and the Constitution of the United States. It would be just as legal to provide that because the paving of said Meyer Boulevard was of an unusual width, and the cost of the paving thereof excessive, that the land within half a mile of said boulevard should pay in proportion to its value for the paving of same.

Defendants aver that it is proposed to assess the general benefits for the opening of said boulevard against the property of said defendants, and other property owners in said district, when the same should be assessed against the city at large; all the citizens of which participate in the benefits thereof.

John G. Paxton, Attorney for Defendants Percy and Gertrude P. Brown.

[fol. 186] Defendants thereupon offered in evidence the motion for a New Trial filed by Gertrude P. Brown in said Cause No. 90628 which was admitted in evidence by the Court over Plaintiffs' objections as Defendants' Exhibit "K." Said Exhibit is, omitting the caption, as follows:

[fol. 187] EVIDENCE: DEFENDANTS' EXHIBIT "K"

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY, MAY TERM, 1915

No. 90628

In the Matter of Grading of MEYER BOULEVARD from the West Line of Swope Parkway to the East Line of the Paseo, under Ordinance of Kansas City, Missouri, Numbered 21831, Approved Jany. 26, 1915

Motion for New Trial

Now comes the Defendant, Gertrude P. Brown, and moves the Court to grant her a new trial herein, for the following reasons, to-wit:

1. The judgment rendered in said cause is against the law.
2. The judgment in said cause is against the evidence.

John G. Paxton, Attorney for said Defendant, Gertrude P. Brown.

[fol. 188] W. F. DUNN, being duly sworn and examined on the part of defendants, testified as follows:

I have lived in Kansas City 30 years and am now superintendent of Parks, Park Department. With the exception of one time when I was out about a couple of years I have been connected with the Park Department 22 years. I am familiar with the proceedings leading up to the improvement of Meyer Boulevard. That was in connection with the work of the Park Board. I was familiar with the establishment of the benefit district for the improvement. Plaintiffs' Exhibit 12 is a plat of the benefit district and is a copy of the original plat prepared under Ordinance No. 21831.

I have been familiar with practically all of the park and boulevard proceedings in Kansas City, having been connected with the Park Board during almost all of its existence.

Mr. Bowersock:

Q. I will ask you to state, Mr. Dunn, from your experience with the Park Board, your own opinion as to the considerations warranting, if they did warrant, the establishment of this benefit district.

Mr. Langworthy: I object to that question because this witness is not qualified as an expert, and it really calls for secondary evidence, the consideration which moved the Park Board.

Over said objection the witness was permitted to answer, as follows:

Witness: I should consider the benefit district for the improvement very reasonable and right, that is, from the experience I have had in all of those condemnations and grading and benefit districts other than this. The district is reasonable because this section of the boulevard is through acreage, unplatted property. It is limited on the south [fol. 189] by ground that had been laid out in streets and small ownerships. To a great extent the same is true of the property north of the benefit district. The property in the benefit district being acreage property could more feasibly be made to conform to the improvement of Meyer Boulevard than if the property were in small sub-divisions and ownerships, where adjustments would have to be made to conform to the streets and grades. Furthermore, as a general proposition, it is a benefit to the property included in the benefit district, as is true with all our park improvements. It seems like a reasonable benefit district.

The ground on each side of Meyer Boulevard is unplatted as to streets and lots. It was unplatted as far south as 67th Street and as far north as 63rd Street. 63rd Street was at the time an open and improved thoroughfare. 67th Street was open but not paved, it was partially graded. The grading of a boulevard is customarily a benefit to the property adjacent to it, and to the property on adjacent streets which are connected with the boulevard. It is a benefit to the entire territory.

Some of the property next to Meyer Boulevard is above the boulevard; some of it is a little below; some of it is on grade. The portion that is above grade is greater than the portion below grade. All of Tract 6 and most of Tract 10 is considerably below the grade of the Boulevard. It has been suggested here that this Boulevard is of unusual width. As to how it compares in width with the other boulevards of the City the following figures will show: The Paseo for its whole length of the City is fully 225 feet wide and wider than that in places. Through the north end of the City from 9th Street to 18th Street the original condemnation was 225 feet wide. Going south [fol. 190] from there, after crossing the Terminal tracks it broadens out to from 300 to 400 feet wide. This is from about 20th Street to 25th Street. Then again from 47th Street to the south City limits it is generally 225 feet wide, except in certain locations where it is a great deal wider. At the intersection of Meyer Boulevard and about Brooklyn or Woodland the Paseo is 700 to 800 feet wide. Ward Parkway varies in width from a few hundred to 700 or 800 feet in width. The formal part of Ward Parkway south of 55th Street is 225 feet wide. That is somewhat similar to this Meyer Boulevard improvement. Gillham Road is of variable width, wider in places than Ward Parkway, but all of variable width. The Paseo from 57th Street to 67th Street is 350 feet wide. So 220 feet is not an unusual width for boulevards in Kansas City.

On cross-examination Mr. Dunn testified as follows:

The difference between a parkway and a boulevard may be stated thus: a parkway may include more platted and irregular land than

a formal boulevard. Otherwise they are both thoroughfares as we construe them, as is also an alley. We would call this particular thoroughfare (Meyer Boulevard) a boulevard.

I think Mr. Kesler's article in the 1914 Report of the Board of Park Commissioners correctly states the situation. That article speaking of Meyer Boulevard says: "This great east and west reach receives practically all of the north and south lines of boulevards and parkways. Every one of these lines of parks and boulevards throughout the entire system are really merely connections between Swope Park on the southeast and the business district of the City on the northwest."

Swope Park at the time it was given to the City was wholly outside [fol. 191] of the City. Later on there was an approach to it called Swope Parkway. The street car system came out to the Park on that line. The only cross-town street that was accessible for the general population was 63rd Street at the time Swope Park was acquired. Since Meyer Boulevard has been graded 63rd Street has become practically disused. I think this is in great part on account of the pavement on 63rd Street. However, very much traffic would naturally go onto Meyer Boulevard in any case. 65th Street will also be a less important street.

Q. It was argued as desirable, as substantially stated here, was it not, Mr. Dunn, that there should be a connection from all the boulevards north and west to Swope Park and this Meyer Boulevard was selected for that connection, wasn't it?

A. Well, Swope Park was considered worthy of the best lines of approach we could give it.

Q. Yes; so you made this the most worthy thing you could work out, didn't you?

A. Tried to.

Certainly one object in constructing the Boulevard was to enable the people of the west part of Kansas City and the north part of Kansas City to reach Swope Parkway. I don't think, however, that this was the principal object. In a sense the Boulevard was intended for the benefit of the other parks and boulevards in Kansas City, and the population of Kansas City north of the Boulevard; however, a boulevard like this could not be put through that class of undivided property without putting in on the market and improving it, giving benefit to it. What Mr. Kessler says as to Meyer Boulevard being really a mere connection between Swope Park and the business district is true of the whole park system. Of course, Meyer Boulevard in connection with the Paseo constitutes an important artery in that system. It was for this reason that the benefit district was enlarged beyond the district which is ordinarily assessed with the cost of grading or improving a boulevard.

The whole improvement of Meyer Boulevard and the Paseo from 47th Street to the south city limits and Brookside Boulevard from [fol. 192] Broadway or Wornall Road to Meyer Boulevard and to Swope Park were taken in one condemnation proceeding and a corresponding benefit district was made to pay for it. This benefit dis-

trict did not comprise two whole park districts but was a special district. It covered generally the property from Broadway to Prospect.

Meyer Boulevard is, of course, a great improvement, an improvement of great general utility, but it is not for the benefit merely of the people who live on the north side of the boulevard, but for the benefit of boulevards that lead to that boulevard from other sections of the City. More especially it was distinctly a benefit to property included in the district in which it was condemned.

Something has been said about the width of the various boulevards in Kansas City the Paseo among them. It is true of the original Paseo from 9th to 18th Streets that parks and sunken gardens and play grounds and other similar improvements of a park nature were constructed in between the driveways. It is also true that toward the southern part of the Paseo partly opposite the Blue Hills Club just north of 63rd Street that there is a wide parkway in between the driveways on the Paseo not yet improved. This parkway is very similar to the parkway between the driveways on Meyer Boulevard. The same is also true on Ward Parkway beyond 53rd Street. It wasn't necessary, of course, in order that the people living in the neighborhood of Meyer Boulevard should have an outlet for their property that these parkways should be provided for between the driveways. That was a part of the general parkway and boulevard system. The boulevards of the City widen out into parkways and narrow into boulevards and driveways throughout the entire City. It is generally true that property abutting on a boulevard receives more special benefits from the building of the boulevard than property a distance away from it. I should say that that is true in this instance.

[fol. 193] CHARLES C. CRAVER, being duly sworn and examined on behalf of defendants, testified as follows:

I was a member of the Board of Park Commissioners of Kansas City at the time the proceedings for Meyer Boulevard were put through. Colonel Lechtman and Dr. Logan were the other members of the Board. I believe that Judge Shannon Douglas was on it the last year. I was on the board which approved this plan for grading Meyer Boulevard. This plat (Plaintiffs' Exhibit 12) is a blue print reduced of the original plat prepared under Ordinance 21831 governing the work.

Mr. Bowersock:

Q. What consideration, if any, did the Board give to the establishment of the boundaries of the benefit district shown on the plat?

Mr. Langworthy: I object to that question as immaterial. I assume the judgment there would be the judgment he would state but it seems to me the official acts speak for themselves.

The Court: I think it is perfectly competent for him to state what his notions were. I think that is probably as far as he should go.

I don't believe his description of what entered into his official acts is hardly competent. I think he may state what he thinks of that and why.

Mr. Bowersock: If Your Honor please, it seems to me it has this bearing. It is charged that this action is arbitrary and unreasonable. Now if it was the result of consideration by the Park Board of all of the considerations out there going over a considerable period of time and the exercise of judgment on their part rather than an arbitrary act that it seems to me should be competent, that they considered the various elements entering into the situation and reached a result which they thought reasonable.

The Court: Well, I will let that in, subject to the objection.

[fol. 194] The Witness:

A. The first thing in a matter of this sort, of course, is the consideration of the reasonableness of placing a burden of this sort on the abutting property. In this instance so much of the property was below grade and affected so adversely by the grade that we thought best to establish a benefit district. Our judgment was largely influenced by the measure of benefit that the adjacent property would receive and how far that benefit would extend. Of course there is a general benefit spread over the entire City for any improvement of this sort. Furthermore, establishing a benefit district is largely a matter of compromise. In this instance 63rd Street was considered a reasonable northern boundary for the reason that traffic originating at 63rd Street on the north would naturally flow toward the north and 63rd Street being a street that was travelled and opened at that time was considered a reasonable boundary for the benefit of the district. On the south 67th Street was in contemplation then of being made a trafficway with a street car upon it. That has not occurred as yet, but 67th Street was open at the time though not fully improved.

South of 67th Street we found the property platted into small lots. The property was sold on the installment plan and small indifferent houses constructed there inhabited by a poorer class of people. From the nature of the country south of 67th Street that property could not be so improved as to get the full benefit of a boulevard like this and we thought, therefore, that it was manifestly unfair to extend the district beyond 67th Street, so a compromise was finally reached and a benefit district established such as you find here according to the best of our judgment as to how the property was affected.

The judgment of the Board at that time is still my judgment. [fol. 195] Q The property north of Sixty-third Street is platted for the most part?

A. Yes sir, it is platted, not in small lots though, they are larger lots.

Q. And that south of Sixty-seventh Street is platted in very small lots?

A. Yes sir; and sold on the installment plan, small homes.

The Court:

Q. And do I understand you think that is a class of property that would not be benefited by the boulevard?

A. There is a general benefit, certainly, extending.

The Court:

Q. Oh, I understand, but I am speaking about special benefits?

A. Oh, we didn't think a sufficient specific benefit to justify the extension of the benefit district beyond Sixty-seventh Street.

Q. Yes; I was trying to get at the reasons there why you thought that distance south of the boulevard, that the extension, special benefit south of the boulevard was less than north of the boulevard. You see you have taken off only about one-half as much on the south as that north and I don't understand your reason for thinking that special benefit didn't extend farther south than Sixty-seventh Street?

A. That property had been divided into small lots, sold to small home owners, sold largely on the installment plan, the class of property that would not benefit to the extent of property that was more subject to a higher class of improvement, for instance.

It would be impracticable for the people living south of 67th Street to go direct to Meyer Boulevard because of the grade leading up to Meyer Boulevard from the south. That property is very much below grade, some of it I think as much as 15 or 18 feet. Furthermore the property south of 67th Street is a class of property which is served more by street cars than by boulevards, and the [fol. 196] street cars of course on Swope Parkway and on Prospect.

I am in the real estate business and have been for about 20 years. In my opinion the grading of a boulevard of this kind through open, unimproved property affects the property very favorably in value. That benefit is not confined to the property immediately abutting on the boulevard but extends back to a considerable distance on each side, the distance back depending upon the circumstances of the particular case. In my opinion the property both to the north and to the south of the boulevard to the limits of the benefit district itself increased in value by the grading proceedings, especially the property on the north side of the boulevard, which is above grade and a better class of property. The benefit from this improvement is greater upon unimproved property of the character of that within the benefit district than it would be upon property already subdivided into lots and blocks because unimproved property lends itself more to a proper adjustment to the improvement.

On cross examination Mr. Craver testified as follows:

The greater portion of the traffic over this boulevard of course originates from the City at large. That is true of all the boulevards. Travel from all of the boulevards drains into this boulevard and Swope Parkway and from there into the park. Since the open-



ing of Meyer Boulevard it is used very much more for travel into Swope Park than Swope Parkway but this is partially due to the fact that the north part of the Parkway is in bad condition. When the bridge is put across Brush Creek, Swope Parkway will probably be as much and more used perhaps than Meyer Boulevard.

Q. The long and short of it is, Mr. Craver, that, this broad [fol. 197] entrance to Swope Park with parkways in between was planned so as to make an appropriate entrance to this great public park? That is what the Park Board had in mind, wasn't it?

A. That is true.

Q. And so it was this boulevard was graded on practically a level plane all the way from Brooklyn clear up to Swope Park, so as to make the effect of this great entrance just a broad level plane approaching this great park? Isn't that true?

A. That is the policy of all the boulevards, to make them as much on a plane as possible to avoid collisions.

Q. But it was made so especially because of this entrance to this great park? Isn't that true?

A. Not any more so than the building of boulevards in other parts of the city.

Q. So that, as a matter of fact, the public at large received the very large and substantial benefit from this opening and widening of this boulevard, isn't that true?

A. The public at large receives much benefit from all the boulevards established in Kansas City; that is true there.

Q. Confined to this particular boulevard there?

A. And as to this particular one, you have got to take the whole system of it to get that public benefit.

Q. But it is particularly true of this particular boulevard, because this boulevard, more than any other one boulevard in the city, leads into a common meeting ground for all of the people in the city?

A. This and Swope Parkway together, yes sir.

Q. All right; so it is particularly true of this boulevard, and Swope Parkway, the public at large received substantially the entire benefit, or a very large portion of the benefit, received from the opening and grading of this boulevard? Isn't that true?

[fol. 198] A. More so than any other.

Q. More so than any other boulevard?

A. I think so. Now, of course—

Q. (Interrupting.) Then it is true, as I stated, isn't it, that the public at large receives the very substantial benefit from the opening and grading of this boulevard as providing means of access to this great park now? That is true, is it not?

A. That is true.

Q. Now you said a moment ago that abutting property is affected favorably by the opening of a boulevard and that is more particularly true of the property abutting immediately on a boulevard, is it not?

A. The favorable effect of property abutting immediately on the boulevard is overcome to quite an extent, and sometimes entirely

so, by the added cost of the street improvements for paving, sidewalks, and,—and so on.

Q. You know, as a matter of fact, matter of common knowledge that throughout the city property that abuts on the boulevard sells for more money than property on side streets? That is true, is it not, generally speaking?

A. Yes sir, generally speaking.

Q. So that the grading on this boulevard was of more benefit to the property abutting upon the boulevard than property that might have been two or three, four blocks away?

A. That property which was below grade, as some of this is, I would say absolutely not, could not be as much as the property that lies nice—

Q. (Interrupting.) I am talking about property generally. Now if you want to refer to specific property you may do so, but I am talking generally about property along the boulevard?

A. Yes sir.

[fol. 199] Q. You would say property abutting the boulevard was more greatly benefited than property away from the boulevard?

A. Yes, sir.

Q. And you could apply that to all property, whether above or below grade, that it was more benefited according to its value.

A. No, no, because I know property next to boulevards in Kansas City that were practically confiscated; they were of very doubtful if—very doubtful value indeed, property that is much below grade.

Q. I think perhaps you don't understand what I mean. Property that is abutting on the boulevard, we will say worth a thousand dollars, is benefited more by the grading of the boulevard than property that may be two or three, four blocks away; isn't that true, although worth a thousand dollars?

A. I want to make myself very plain on that. This property that is five, ten, fifteen feet below grade is almost worthless.

Q. All right; let us talk about—

A. (Interrupting.) Now the nice lying property, property that lends itself for residence purposes, nice residence purposes, of course, is benefited more.

Q. Let us not talk about that property, because as a matter of fact there are only two or three places along the whole boulevard, the entire length of this boulevard—mile in length—only two or three places where the property is left substantially below grade, isn't there?

A. No, I don't think so.

Q. Close to Park and about Garfield Place is about all there is—I was over there this morning—isn't that true?

A. No, not in my judgment.

Q. Well, a very large portion of this property along the boulevard, very large proportion of it, is either substantially on grade, or slightly [fol. 200] above grade, proper distance above grade to make it available for building purposes; isn't that true?

A. Yes sir, most of it is; but not the very large proportion.

Q. Well, leave it that way. I understand your testimony to be that most of it is?

A. Yes sir.

Q. Now then, as to that which is in that situation, I understand it to be your opinion that that receives a greater benefit proportionately by reason of the opening of the boulevard and grading of it than property which is situated away from the boulevard? That is true, is it not?

A. That is true.

Q. And it is true that the farther you get away from the boulevard the less the benefit is, special benefit?

A. Yes.

Q. Now do you know how far south of Meyer Boulevard the benefit district extended which provided for assessment of damages for the taking of land for Meyer Boulevard?

A. I took in the entire district.

Q. In other words, it went clear south to Seventy-fifth Street, did it not?

A. Yes, I believe it did.

Q. And went clear south to Seventy-fifth Street on the theory that all of the property clear south to Seventy-fifth Street was benefited by the taking of land for this boulevard?

A. Yes sir.

Q. Now if that property was benefited by the taking of lands for the opening up of this boulevard, why was it not likewise benefited by the grading of this boulevard so it could be opened up and used?

A. On the theory that the establishment of an improvement like [fol. 201] this in a district is—the mere establishment of an improvement like this in that district, is of distinct benefit to the whole district. Now when you come down to the physical end of it, use of it, daily use, and all that sort of thing, it confines itself to a lesser district and you would have overlapping and all that sort of thing in spreading the benefit assessments for different boulevards over different districts that would be very confusing.

Q. It stands to reason, of course, it would do no good to open up or take the land for this boulevard unless you opened it up and graded it so it could be used?

A. Certainly.

Q. If the land was taken and never opened up or used, of course, it would be of no benefit to anyone?

A. No.

Q. And if these people clear down to Seventy-fifth Street had paid for the acquiring of the land for that boulevard then it was to their interest and to their special benefit that that should be graded so they could use it?

A. Well, there is a general benefit that attaches to all improvements of this sort in a district, for which they pay a penalty. That is what it is.

Q. It is undoubtedly true that people south of Meyer Boulevard in going from their homes to town, unless they go on the street car,

would naturally go over Meyer Boulevard and from there over to the Paseo and from there down town?

A. Oh yes.

Q. That would be the natural way for them to go?

A. Absolutely.

Q. And the natural way for people living north of Meyer Boulevard would be to go down either over the Paseo or Sixty-third or Ward Parkway and go to town in that way? That is true, isn't it?

[fol. 202] A. Not exactly, no. A man in an automobile don't regard distance, you know, and he seeks the best way to go, the best road, the best street, regardless of two or three or four blocks——

Q. (Interrupting.) You don't drive——

Mr. Bowersock: Let him answer.

A. (Continuing:) Regardless of two or three, four blocks in riding, so that has got to be taken into consideration.

Q. You don't drive a quarter of a mile out of the way to go down town, do you, if you have got a direct way?

A. Owing to the condition of the streets. If the streets are bad, what is a quarter of a mile? Nothing.

Q. Well, take for instance on Sixty-third Street, fronting on the north, practically a quarter of a mile from Sixty-third south to Meyer Boulevard. On the other hand there is Sixty-Third Street leading into the Paseo and Prospect leading down to Swope Parkway and also Ward Parkway, all of which lead down town; now you don't mean to be understood as saying people generally would take their cars and drive a quarter of a mile south and then a quarter of a mile back north again, being practically half a mile out of their way, you don't mean to say people would do that just for the pleasure of driving over Meyer Boulevard? You don't mean that?

A. For pleasure driving they seek the most favorable way to go.

Q. I am talking about going for business purposes, for pleasure might drive over the whole boulevard system. You don't mean to say they would drive quarter of a mile out of their way to get down town?

A. Oh no.

Q. Now you know, as a matter of fact, this property you speak of as being below grade has been platted, do you not?

A. I do, yes sir.

[fol. 203] Q. And streets have been laid out?

A. Yes sir.

Q. And, as a matter of fact, the distance that property is below grade extends only a short distance south, so when that property is graded up it will all be practically on the boulevard?

A. The few feet of it that is so much below grade perhaps is not worth the street improvements it will cost to put it in now.

Q. That part of it that is so situated is comparatively insignificant as compared to the entire amount of property along that boulevard, is it not?

A. With reference to that that is on grade, above grade?

Q. Yes?

A. There is more of it on grade and above grade.

Q. It is comparatively insignificant?

A. No, it is not insignificant, because——

Q. (Interrupting.) Well, it has all been platted and lots have all been sold?

A. Oh, you can sell lots ten dollars down and dollar a week—that is the way that property was sold—yes, anyone can.

The Court:

Q. Mr. Craver, one thing I would like to get clear on: You say it is a benefit, you say it is an improvement, a large improvement to this district benefited, now that is true if it becomes an improvement?

A. Oh yes.

Q. A finished product?

A. Yes sir.

Q. If you were to just simply take some waste land and never do any more with it, it would never be of any great value to that district?

A. Oh no.

Q. Then how can you make the distinction or differentiation between the different steps in doing so from the start until it ripens into a completed improvement? Isn't it of the same benefit and doesn't [fol. 204] that necessarily inure as a benefit that comes from the establishment of an improvement of that kind in a district?

A. Yes, Judge, I think that enters into the proposition, but this tax is not put on that property but onto the abutting property.

Q. I know about that feature, I am talking about the benefit, I am talking about the benefit to the district?

A. Why any improvement of this character is certainly a benefit to an extended degree for which they should pay, especially when the cost becomes so heavy upon the abutting property.

Q. That is true, but what I am getting at is, why isn't that also correspondingly true as in the original acquisition where the benefits extended further on out?

A. Simply because got to draw the line somewheres and we drew it there.

Q. In other words, you drew it for arbitrary, for convenience?

A. No; a matter of compromise. I will give you an illustration.

Q. That is the same thing?

A. I will give you an illustration: We established the benefit district for the Paseo from Forty-sixth Street south, which was an expensive improvement, very expensive, and we were two years I will say in getting all the divergent interests together and compromising on the benefit district between Prospect and Troost. We finally did so and I believe it has always been an improvement.

Q. When you speak of compromise, whom did you compromise with?

A. The fellows interested who appeared before the Park Board.

Q. They come in and present their claims and you hear them?

A. Yes sir.

Q. And you go over the matter and then reconcile your own divergent ideas as the board?

A. Yes sir; yes, use our best judgment.

[fol. 205] On re-direct examination Mr. Craver testified as follows:

The entire matter of fixing the limits of the benefit district is more or less a question of degree.

What has been said with regard to the public using Meyer Boulevard can be made to apply in the same manner to all of the boulevards in the City.

Furthermore, public, as here used, means the public as individuals, and not the public as landlords. The question of benefits and damages in proceedings of this kind refers to property owners and not to citizens in general.

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CUSIL LECHTMAN, being duly sworn and examined on behalf of defendants testified as follows:

I have lived in Kansas City since 1887 and I was a member of the Park Board of Kansas City when the benefit district for the grading of Meyer Boulevard was established. In my opinion that benefit district was a reasonable district for the doing of this grading.

In considering the benefits of the various boulevard improvements I divided benefit into two classes, one as a sort of a consequential benefit and the other a direct benefit. The consequential benefit could not be controlled because it was the general result of the improvement and did not result from any direct improvement on any particular piece [fol. 206] of land, so that in fixing the boundary lines of any benefit district I tried to determine where the direct benefit from the improvement would be. In arriving at this particular grading improvement I considered that 63rd Street was quite a thoroughfare and that a street car line was contemplated on 67th Street. 63rd Street is also almost a direct entrance to Swope Park and I fixed the direct benefit between those two streets. Furthermore the land between 63rd and 67th Streets was not platted and had no improvements at all at that time, whereas the land north of 63rd Street was more or less platted and that south of 67th Street was platted into small lots.

On cross examination Mr. Lechtman testified as follows:

There is no doubt but that this improvement is a general improvement for the benefit of the whole City but the greatest benefit to property is to the close-by property. The Boulevard was not established merely for the benefit of the immediate property owners but also in order to complete the entire boulevard system, but the establishment of such a boulevard is going to cause an immediate benefit to nearby property.

KELLY BRENT, being duly sworn and examined on behalf of the defendants testified as follows:

I have lived in Kansas City 35 years and have been in the real estate business during all of that time. I have had experience in the platting and selling of acre property mostly within the last 15 years. I have been in Kansas City during all of the development of the park and boulevard system and am familiar with real estate values here. I am familiar with the character of the property in the benefit district shown on plaintiffs' Exhibit 12 and with the character of the property north and south of that benefit district. In my opinion the benefit district as shown on the plat is a reasonable benefit district for paying the cost of that improvement.

When the boulevard was established all of this ground which is in the benefit district was acre property, unplatted and undeveloped and it was a great benefit to it to be opened up. It is mighty hard to get a thoroughfare like this through a territory that is undeveloped. The property south of 67th Street is platted into small tracts and developed to such an extent in the way of private improvements that it would almost have been impossible for it to have been affected directly by the benefit of this boulevard. There is no direct north and south connection between the property south of 67th Street and Meyer Boulevard, between Prospect Avenue and Swope Parkway. Such a connection would only be possible by winding roads such as have been made, and very beautifully made, in certain portions of the City and most unfortunately this ground south of 67th Street has been platted otherwise.

The property north of 63rd Street is platted into tracts of varying sizes, most of them in tracts from  $\frac{1}{2}$  to  $2\frac{1}{2}$  acres, for residence purposes. That property is built up and considerably improved. The property south of 67th Street is built up to a considerable extent but with small homes. These are my reasons for believing that the property south of 67th Street and north of 63rd Street should not be included in the benefit district.

The idea is that the boulevard opened up and made possible the development of this property which had not already been so far developed as to be interfered with by the improvement. The grading of the Boulevard a block farther south than the line which was the center of this acre territory was an engineering proposition. But the benefit, in my judgment was more directly to the acre property [fol. 208] no matter where the boulevard went through it. In my opinion all of the property in this benefit district benefited by the grading.

I have been asked many times whether as a general rule property abutting upon a boulevard of this kind increases in value more by the grading than property back from the boulevard. This is a question that attorneys are not as conversant with as real estate men. That is one of those questions which you cannot answer by yes or no. In this particular instance the grading of Meyer Boulevard possibly hurt the abutting property. At other places it very materially would enhance the value of the abutting property. Over 50% of the terri-



tory covered by this grading ordinance is way below the grade of the boulevard. By this I mean over 50% of the abutting property and the property on 65th Street would be as much if not more benefited by this grading than that street would be. These general questions are hard to answer.

I think that in this particular case the boulevard is a benefit to the district. Everyone, almost who drives an automobile would, when driving to any section, use the boulevard. If I am going out to the northeast corner of this town I take the boulevard to get there, no matter where I am going. If I am going to Montgall or St. John or Askew or wherever I am going, I go on the boulevard, and after I get into the territory I get off the boulevard and go to the particular place. Any man who drives an automobile would go a quarter of a mile out of his way to get onto one of these boulevards to drive four or five miles after he gets there.

On cross examination Mr. Brent testified as follows:

If I were at 63rd Street and Olive with my automobile I would drive over to Prospect and then south to Meyer Boulevard and then go downtown on the boulevard instead of going to Swope Parkway and downtown that way. Mr. Crittenden and I developed an addition out there and when we were developing this territory we instructed our salesmen to take their customers out Swope Parkway and over to Meyer Boulevard as being the most pleasant way and best way to get to 63rd Street which was a third of a mile farther than they would have gone if they could have gone out the other way. We platted both of the additions just north of 63rd Street running from Prospect to Swope Parkway.

Under our method of procedure the City necessarily has to fix certain benefit districts and it is very hard for the Council to know just where to draw the line.

I don't see how Swope Park could have received any direct benefit from this improvement because it is a pleasure ground and not used for commercial purposes. I don't know what sort of benefit it could be considered as receiving. If Swope Park was not a park it probably should be in the benefit district and probably would have been included by the ordinance. Waiving for the moment the fact that Swope Park is a park and considering merely the location of the land included in the park, that land probably receives as much direct benefit from the building of the boulevard as the other property out there, but if the park had not been there conditions would have been so different. The boulevard might then just have gone on like any other boulevard and the property which now constitutes Swope Park would not have received any more benefit than any other piece of land through which the boulevard passed. I do not think that Swope Park received a direct benefit from this improvement. If the land in the park had been used for commercial purposes it would have been benefited. The boulevard is of course a benefit to the public, indeed, every citizen of Kansas City is individually benefited, and the opening of the boulevard greatly enhances the value

of Swope Park as a park. It greatly increases the accessibility of the park but I don't know that it makes the park any better after you get there.

[fol. 210] With regard to the property south of 67th Street I don't say that a boulevard through platted property does not benefit the property. What I mean is that property already platted, like the property south of 67th Street is not susceptible to personal and individual development in a manner, for example, along the lines in which Mr. Nichols is developing Crestwood or some place of that kind with winding roads. This acre ground in the benefit district could be and was in a position to be developed differently from that platted property south of 67th Street.

JOHN A. MOORE, being duly sworn and examined on behalf of the defendants, testified as follows:

I have lived in Kansas City 43 years and for 35 years of that time have been in the real estate business. I have had experience in the platting and selling of residence property having platted a number of additions. This experience has extended over the entire 35 years. I have been familiar with the development of the park system in Kansas City and with the effect of that development upon the prices of property. I am also familiar with the real estate values here. I am familiar with the character of the ground within the limits of the benefit district shown on Plaintiffs' Exhibit 12 and am familiar with the grading that has been done on this boulevard and with the physical conditions there.

In my opinion the benefit district established for the assessment of the benefits for the grading of Meyer Boulevard is a reasonable district. I base that opinion upon this theory; that the property which is the benefit district was acre property and undeveloped and unplatted, and not built on, and was susceptible of a better improvement than property that had already been built up. Consequently, [fol. 211] it could respond to the benefits that would come to the neighborhood by the building and construction of this Boulevard. It is practically impossible to change a neighborhood once built up. You can take all the boulevards of this City as you know them and you will find that neighborhoods which were built up with poor buildings when the boulevards were constructed through them continue with poor buildings. It is practically impossible to change the character of property after it has once been established. But with vacant unplatted lands the effect of a boulevard is different. It is possible to develop a large acre tract in some scientific way beneficially, so that it will derive the benefits that come from some great improvement.

The property south of 67th Street has been platted into comparatively small lots and built up with quite small houses. It has been developed sufficiently to characterize the neighborhood. Its character has been established, so much so that it would be practically impossible, in my opinion, to change it.

The property north of 63rd Street had been platted and some im-

provements had been built and a sort of development had been begun there so that it didn't appear wise to undertake to change it. Those are my principal reasons for limiting this district at 63rd Street and 67th Street.

As a general rule in the development of a boulevard, property directly abutting on the boulevard is more favorably affected than that farther back. This is not always the case, however. With regard to this particular improvement the improvement unfortunately practically destroyed a lot of the property fronting on the boulevard. The grading of the boulevard left a lot of the property below grade, some of it, I think as much as 35 feet below grade. I don't know how to develop a piece of property of that kind. It has no value. Such property although abutting on the boulevard would not be benefited as much as property lying further back. The benefit [fol. 212] would be affected in the same manner though in a different degree with property which was not so much below grade.

On cross examination Mr. Moore testified as follows:

In my opinion it would not be fair to assess property left below grade to the same extent as property on grade with the boulevard. It is my notion that a lot 35 feet below the level of the street is not justly chargeable with the same expense as property on grade. In my opinion the benefits following from the grading of a street should not be assessed arbitrarily, but in proportion to the benefits actually received. That would seem the equitable way. Property which, by reason of the topography of the country, is low or inaccessible to the improvement, ought not to be assessed the same amount as the good property.

My theory in connection with the establishment of this benefit district is this. Here we have about 240 acres of land just a mile long, from Brooklyn to Prospect. If some man with a broad vision got hold of the tract it is capable of being made one of the finest developments around Kansas City. In order to get this benefit it should be developed under substantially a unified or a uniform development. It would be very injurious to the property in this benefit district if the various tracts are developed under separate ownership and platted into small insignificant lots with small houses on them. Such a development would absolutely destroy the possibility of large development along the lines I have suggested. I am bound to say that the recent platting and development which has gone on out there in the last year has been shameful. I refer to the Park Gate development.

[fol. 213] Defendants hereupon introduced in evidence the contract for the sale of Park Gate addition. This contract was admitted in evidence by the Court as Defendants' Exhibit "L" and is substantially as follows:

## [fol. 214] DEFENDANTS' EXHIBIT "L" TO MOORE'S TESTIMONY

## Agreement

This agreement made this 14th day of April, 1920, by and between Thomas H. Swope party of the first part, and N. P. Dodge of Omaha, doing business as N. P. Dodge & Co. party of the second part, witnesseth:

First. That whereas the party of the first part owns acreage property in Kansas City, Mo., bounded by Prospect Avenue, Swope Parkway, 65th Street, and 67th St., containing ninety-seven acres more or less which it is proposed to plat into twenty-five foot lots, and is desirous of obtaining the services of the second party as selling agents for said lots, and,

Second. In consideration of the covenant made by the party of the second part, it is agreed and understood that he shall have the exclusive right to sell said land into lots for a period of Two years from date of this contract, and shall receive a commission of fifty dollars (\$50.00) on each lot sold by him or his agents, which commission is paid out of one-half of the proceeds of the sale of each lot, as it is paid for by the purchaser. That is to say, the second party shall receive one-half of the amount paid in on each lot, until his commission is paid, then all payments shall be credited to the party of the first part by the collecting bank. It is also understood and agreed that all payments on the contracts that are cancelled for non-payment or "lapsed," are to be divided share and share alike up to the amount of commission and in case lots are sold again to new purchaser a new commission will be allowed just as if the lots were never sold before.

[fol. 215] Third. In consideration of the above, the second party agrees to have said lots surveyed and staked on street and alley with stakes 2 x 2 x 24 inches, painted white, each stake to be numbered with a lot number, and at each block corner, a sign post to be erected 4 x 9 x 9 feet, with neatly lettered street signs attached, a gas pipe stake to be used at block corners as monuments. The streets are to be graded with a blade machine in a neat form, the grass and weeds are to be cleared off the premises, plowed ground, if any, to be seeded, trees to be trimmed and the property in every way to be made neat and attractive. For this purpose, the party of the first part agrees to bear the expenses of surveying, staking, trimming trees, clearing, seeding, grading of the streets and either to advance the money for these improvements in getting the property ready for sale, or to allow the party of the second part all of the proceeds from the sale of lots until the owners share of such proceeds equals the money actually expended for the purpose above set forth. It is understood and agreed, however, that the expenditure or allowance shall not exceed Twenty-five Hundred Dollars should it exceed that amount, such additional cost shall be borne by the party of the second part.

Fourth. The party of the second part agrees to put on a sale of said lots on terms as follows: All lots fronting on the Meyer Boulevard shall be sold on terms of not less than ten dollars (\$10.00) down and two dollars (\$2.00) a week. The other lots shall be divided into two classes the higher priced lots to sell for five dollars (\$5.00) down and one dollar (\$1.00) a week and the balance for one dollar (\$1.00) down and one dollar (\$1.00) per a week, it being understood that one-half of the lots shall be offered at the minimum terms.

[fol. 216] All contracts to be without interest or regular taxes for two years and allowing a bonus of 10% for all payments of ten dollars or over in advance during the two year period in which no interest is charged and a 15% discount for payment in full within thirty (30) days. The contract to contain reasonable restrictions as to houses. The exact terms of the contract to be issued are set forth in a form attached to this contract, and made a part thereof. No change in the terms of this contract shall take place without the approval of the owner.

Fifth. The second party agrees to put on a sale of said lots in the spring or early summer of 1920, and during the continuance of this contract, to use every effort to sell said lots, the same as he has done on his own and other additions in various cities of the United States. He also agrees to re-sell the lapsed lots, using every endeavor to keep all of the lots sold. If the second party fails to sell one-half of the lots within one year from June 1st, 1921, the party of the first part may cancel his agreement upon thirty days' notice in writing and in the event of such cancellation party of the second part shall have no further claim for commission save on lots sold prior to said cancellation.

Sixth. Party of the first part agrees that he will execute a plat of said addition and will execute all deeds to lots when paid for under the terms of the contract attached hereto, and authorize the party of the second part to sign for him, all contracts at the sale and thereafter, as lots may be sold during the terms of this contract, and he agrees to carry out all covenants of the contract attached hereto, and to furnish a printed copy of abstract on said property with each lot sold, said abstracts to be brought down to date and delivered with deed, when lot is fully paid for.

[fol. 217] Seventh. It is understood and agreed that all payments on contracts for the sale of lots save such payments as are made on the ground at the time of the sale, shall be made at the —, which shall be the collecting bank and the proceeds after deducting the charge of the bank for collecting, shall be divided share and share alike, until the commissions above stipulated are paid, and thereafter all of the proceeds from the sale of each lot shall be credited to the account of the parties of the first part each week, subject to their check. It is understood and agreed that such division of the proceeds shall not take place until the party of the second part is re-

imbursed for the expense of improvements, and preparation for the original sale as provided in paragraph three, out of the share of the parties of the first part, hence all of the proceeds from the sale of the lots shall be credited to the party of the second part until the share of the parties of the first part has equalled the amount expended on the ground, but not to exceed Twenty-five Hundred Dollars, as above provided.

Eighth. The second party agrees to make a price list at which the lots shall be sold and submit it to the party of the first part for his approval before opening the sale, it being agreed that the gross selling price of the lots shall not be less than Three Hundred Thousand Dollars (\$300,000.00).

Ninth. Weekly reports of collections shall be made to both parties by the bank upon collection sheets furnished by the party of the second part, and the second party at his own expense shall send notices each week to delinquent purchasers and shall keep an accurate account of all money paid on contract, so long as he shall have an interest in the sale of the individual lots, it being understood and agreed that the first party save as stipulated in Section 3 of this contract, is to be put to no expense whatever, in connection with the sale of lots save for taxes, abstracts and the collection fee of the col- [fol. 218] lecting bank.

In witness whereof, we have hereunto set our hands and seals this date above written.

Thos. H. Swope, N. P. Dodge.

It is agreed that party of first part may reserve from the sale lots facing Swope Parkway.

N. P. Dodge.

[fol. 219] Thereupon the Defendants rested their case.

And thereupon all parties hereto, both Plaintiffs and Defendants, rested.

The foregoing is an abstract of all the testimony introduced by either party.

#### IN UNITED STATES DISTRICT COURT

#### ORDER SETTLING CONDENSED STATEMENT OF EVIDENCE

The above and foregoing is hereby approved as a true, complete and properly prepared condensed statement of all the material testimony taken in the above entitled cause, and it is ordered that said statement be filed herein, and made a part of the record in this cause, for the purposes of the appeal heretofore allowed to the United States Circuit Court of Appeals for the Eighth Circuit.

Dated this 4th day of March, 1922.

Arba S. Van Valkenburgh, Judge. O. K. Marley & Reed,  
Attys. for Plaintiff.

[fol. 220] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
WESTERN DIVISION OF THE WESTERN DISTRICT OF  
MISSOURI

[Title omitted]

PRÆCIPE FOR TRANSCRIPT—Filed Feb. 24, 1922

To the clerk of said court:

In the preparation of the transcript on the appeal of McMillan Contracting Company, a corporation, and Fidelity National Bank and Trust Company of Kansas City, a corporation, defendants above named, from the order and decree made and entered in the above entitled cause on July 7, 1921, please incorporate the following portions of the record into the transcript:

1. Complainants' first amended bill of complaint, filed January 29, 1920.

2. Amended separate answer of Fidelity National Bank and Trust Company of Kansas City, to first amended bill of complaint, filed January 25, 1921.

3. Complainants' reply to the amended separate answer of Fidelity National Bank and Trust Company of Kansas City, filed January 28, 1921.

4. Memorandum opinion, filed June 28, 1921.

5. Decree of July 7, 1921, cancelling the special tax bills involved in this action.

6. Petition for appeal from said decree, filed January 4, 1922.

7. Assignment of errors filed therewith.

8. Order allowing appeal, entered January 4, 1922.

9. Citation to complainants, with acknowledgment of service thereon, dated January 4, 1922.

[fol. 221] 10. Bond for appeal, filed and approved January 6, 1922.

11. Election as to printing transcript, filed January 4, 1922.

12. Condensed statement of testimony, prepared pursuant to Equity Rule 75-B, filed February 13, 1922.

13. Notice to complainants of the filing of said condensed statement, with acknowledgment of service thereon, filed February 13, 1922.

14. Præcipe for transcript.

Bowersock & Fizzell, Miller, Camack, Winger & Reeder,  
Clarence S. Palmer, Attorneys for Defendants and Ap-  
pellants.



Received copy of the above and foregoing præcipe this 23rd day of February, 1922.

Warner, Dean, Langworthy, Thomson & Borders, Attorneys  
for Complainants.

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[fol. 222] And afterwards, to-wit, on the 27th day of February, 1922, an Order extending the time for filing transcript in the United States Circuit Court of Appeals was filed and entered of record. Said Order is in words and figures as follows, to-wit:

[fol. 223] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
WESTERN DIVISION OF THE WESTERN DISTRICT OF MIS-  
SOURI

[Title omitted]

ORDER EXTENDING TIME FOR FILING RECORD—Filed Feb. 27, 1922  
1922

Now on this 27th day of February, 1922, this cause coming to be heard on the application in open court made by the above named defendants for an extension of time within which to file in the office of the Clerk of the United States Circuit Court of Appeals of the Eighth Circuit, a transcript of the record in the above entitled cause,

It is now by the court, for good cause shown, ordered, adjudged and decreed that the time within which the above named defendants may file said transcript in the office of the Clerk of said Court for the purposes of the appeal heretofore taken in this cause to the United States Circuit Court of Appeals for the Eighth Circuit, is hereby extended for a period of sixty days from the return day of said appeal.

Arba S. Van Valkenburgh, Judge.

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[fol. 224] And afterwards, to wit, on the 4th day of March, 1922, a Stipulation relative to forwarding certain original Exhibits to the United States Circuit Court of Appeals was filed.

Also on the same date an Order directing the Clerk to send certain original Exhibits to the United States Circuit Court of Appeals was filed and entered of record.

Said Stipulation and Order are in words and figures as follows, to-wit:

[fol. 225] IN THE DISTRICT COURT OF THE UNITED STATES WITHIN  
AND FOR THE WESTERN DIVISION OF THE WESTERN  
DISTRICT OF MISSOURI

[Title omitted]

STIPULATION AS TO EXHIBITS—Filed Mar. 4, 1922

It is hereby stipulated and agreed by and between the parties hereto that the following original exhibits introduced and received in evidence on the trial of this cause, and filed herein, to-wit: Plaintiffs' Exhibits 12, 13, 16 to 23, inclusive, and 25 to 27, inclusive, may be transmitted to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, and that said exhibits may be considered as incorporated in and as a part of the condensed statement of testimony, filed herein pursuant to Equity Rule 75-b, as though actually and fully set out in or attached to said condensed statement.

Warner, Dean, Langworthy, Thomson & Borders, Attorneys for Complainants. Bowersock & Fizzell, Miller, Camack, Winger & Reeder, Clarence S. Palmer, Attorneys for Defendants.

[fol. 226] IN THE DISTRICT COURT OF THE UNITED STATES WITHIN  
AND FOR THE WESTERN DIVISION OF THE WESTERN  
DISTRICT OF MISSOURI

[Title omitted]

ORDER AS TO EXHIBITS—Filed Mar. 4, 1922

Now on this 4th day of March, 1922, this cause coming on to be heard, and it appearing to the court that a stipulation by and between the parties hereto has been filed herein, to the effect that certain original exhibits introduced and received in evidence on the trial of this cause may be transmitted to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, and that said exhibits may be considered as incorporated in the condensed statement of testimony filed herein.

Now, Therefore, it is by the court ordered, adjudged and decreed that the following original exhibits introduced and received in evidence on the trial of this cause, to-wit: Plaintiffs' Exhibits 12, 13, 16 to 23 inclusive, and 25 to 27 inclusive, shall be transmitted by the Clerk of this court to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, for use on the hearing of this cause on appeal in said court, and in lieu of the incorporation of said exhibits in the condensed statement of testimony filed herein, to be by said Clerk returned to this court upon the final determination of said appeal; and said exhibits are hereby incorporated and included in said condensed statement of testimony and made a part thereof, the same as though actually and fully set out therein.

Arba S. Van Valkenburgh, District Judge.

[fol. 227] And afterwards, to-wit, on the 10th day of March, 1922, Supplemental Præcipe for Transcript was filed.

Said Supplemental Præcipe for Transcript is in words and figures as follows, to-wit:

[fol. 228] IN THE DISTRICT COURT OF THE UNITED STATES FOR  
THE WESTERN DIVISION OF THE WESTERN DISTRICT  
OF MISSOURI

[Title omitted]

SUPPLEMENTAL PRECIPE FOR TRANSCRIPT—Filed Mar. 10, 1922

To the clerk of said court:

In preparation of the transcript on the appeal of McMillan Contracting Company, a corporation, and Fidelity National Bank and Trust Company of Kansas City, a corporation, defendants above named, from the order and decree made and entered in the above entitled cause on July 7, 1921, please incorporate into the transcript in addition to the portions of the record called for in the præcipe heretofore filed herein on February 24, 1922, the following:

1. Order extending time for filing record in Circuit Court of Appeals, entered February 27, 1922.

2. Stipulation as to forwarding to Clerk of Circuit Court of Appeals plaintiffs' original Exhibits 12-13, 16 to 23 inclusive, and 25 to 27 inclusive, filed March 4, 1922.

3. Order in accordance with said stipulation, entered March 4, 1922.

4. Supplemental Præcipe for transcript.

Bowersock & Fizzell, Miller, Camack, Winger & Reeder,  
Clarence S. Palmer, Attorneys for Defendants and Appellants.

Received copy of the above and foregoing supplemental præcipe this tenth day of March, 1922.

Warner, Dean, Langworthy, Thomson & Borders, Attorneys  
for Complainants.

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[fol. 229] And afterwards, to-wit, on the 2nd day of May, 1922, an Order extending time for filing transcript was filed and entered of record.

Said Order extending time to file transcript is in words and figures as follows, to-wit:

[fol. 230] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
WESTERN DIVISION OF THE WESTERN DISTRICT OF  
MISSOURI

[Title omitted]

ORDER EXTENDING TIME FOR FILING RECORD IN THE CIRCUIT COURT  
OF APPEALS—Filed May 2, 1922

Now on this 2nd day of May, 1922, this cause coming on to be heard on the application in open court made by the above named defendants for an extension of time in which to file in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit a transcript of the record in the above entitled cause.

It is now by the court for good cause shown ordered, adjudged and decreed that the time within which the above named defendants may file said transcript in the office of the Clerk of said Court for the purpose of the appeal heretofore taken in the above named cause to the United States Circuit Court of Appeals for the Eighth Circuit is hereby extended to July 4, 1922.

Arba S. Van Valkenburgh, Judge.

[fol. 231] And afterwards, to-wit, on the 3rd day of May, 1922, a Second Supplemental Præcipe for Transcript was filed

Said Second Supplemental Præcipe for Transcript is in words and figures as follows, to-wit:

[fol. 232] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
WESTERN DIVISION OF THE WESTERN DISTRICT OF  
MISSOURI

[Title omitted]

SECOND SUPPLEMENTAL PRÆCIPE FOR TRANSCRIPT—Filed May 3,  
1922

To the clerk of said court:

In the preparation of the transcript on the appeal of McMillan Contracting Company, a corporation, and Fidelity National Bank and Trust Company of Kansas City, a corporation, defendants above named, from the order and decree made and entered in the above entitled cause on July 7, 1921, please incorporation into the transcript in addition to the portions of the record called for in the præcipes heretofore filed herein on February 24, 1922, and on March 10, 1922, the following:

1. Order extending time for filing record in the Circuit Court of Appeals, entered May 2nd, 1922.

2. Second Supplemental præcipe for transcript.

Bowersock & Fizzell. Miller, Camack, Winger & Reeder.  
Clarence S. Palmer, Attorneys for Defendants and Appellants.

Received copy of the above and foregoing second supplemental præcipe this 2d day of May, 1922.

Warner, Dean, Langworthy, Thomson & Borders, Attorneys for Complainants.

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[fol. 233] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
WESTERN DIVISION OF THE WESTERN DISTRICT OF  
MISSOURI

In Equity. No. 163

WALTER L. ABERNATHY and CARRIE S. ABERNATHY, Complainants,

vs.

FIDELITY NATIONAL BANK & TRUST COMPANY et al., Defendants.

In Equity. No. 207

B. HAYWOOD HAGERMAN, Complainant,

vs.

FIDELITY NATIONAL BANK & TRUST COMPANY et al., Defendants.

In Equity. No. 215

FELIX H. SWOPE et al., Complainants,

vs.

FIDELITY NATIONAL BANK & TRUST COMPANY et al., Defendants.

#### MEMORANDUM ON FINAL HEARING

These cases involve the validity of certain tax bills issued against the property of complainants to pay for the grading of Meyer Boulevard from the Paseo east to Swope Park. These bills are based upon proceedings instituted under Section 28 of Article 8 of the Charter of Kansas City Missouri. This section provides that where, in the grading of a street there is an unusual amount of filling, or cutting or grading away of earth or rock, so that the expense imposes too great a burden on and situated in the benefit district, consisting of property abutting upon the street to be improved, as provided in Sec-

tion 3 of Article 8, then the cost may be assessed against the property located within a larger benefit district to be fixed by the city council. [fol. 234] Section 28 further provides for the enactment of an ordinance authorizing the improvement, and that the city shall file a proceeding in the Circuit Court of Jackson County, Missouri, in the name of the city, against the respective owners of land chargeable, and that the prayer of the petition shall be that the court find and determine the validity of the ordinance, and the question of whether or not the respective tracts of land within the benefit district shall be charged with the lien of the work. Service of process shall be governed by the provisions of Section 11 of Article 13 of the Charter, which provide for service by publication. After such court proceedings have been disposed of it is provided that the city may then enter into a contract for the work contemplated, and that after the work has been completed the estimate of the cost thereof, and the apportionment of the same against the various lots, tracts and parcels of land within the benefit district shall be made by the Board of Public Works according to the assessed value thereof, exclusive of improvements, with the assistance of the City Assessor, who shall, on demand of the Board of Public Works, cause an assessment to be made of the value of the lands to be charged with the cost of such grading, and shall deliver such assessment to the Board of Public Works, who shall apportion the cost according to the value thereof fixed by the City Assessor.

Meyer Boulevard, from the Paseo to Swope Park, is a broad highway, being two hundred and twenty feet wide at its narrowest point, and five hundred feet wide as it approaches the park. Provision is made for parkways between the driveways, so that of the total area of the Boulevard only about eleven acres are taken up by the driveways, and the remaining twenty acres consist of grass parkways. [fol. 235] The grading includes the entire area. The benefit district extends approximately one mile in length, and lies between 63rd and 67th Streets, a width of approximately four blocks, which area includes the land taken for the boulevard itself. The grading cost, for which the tax bills were issued, was substantially \$97,000. The total assessed valuation of the benefit district, specially made for the purposes of this improvement, was \$378,955. The rate of assessment to total assessed value is thus found to be approximately 26 per cent.

It appears from the evidence that the City Assessor, in assessing the value of the property in the benefit district, assessed all of the property at substantially the same value per acre, and that all the property was assessed for this special purpose at a value several times that at which it is and was assessed for general tax purposes. This will appear concretely from a consideration of the tracts belonging to complainants.

Tract No. 2, belonging to Gertrude M. Brown, was assessed, for general tax purposes, in the year 1915, at \$4,750; for 1916 at \$4,750; for 1917 at \$5,000. In 1916, for the purposes of this grading, at \$25,960. The tax bill against this property for this grading was

\$6,693.40. Tract No. 3, belonging to Felix H. Swope, was assessed, for general tax purposes, in the year 1915, at \$6,240; for 1916, at \$6,240; for 1917 at \$6,240. In 1916 for Meyer Boulevard at \$25,440. The tax bill against this property for this grading was \$6,558. Tract No. 8, belonging to Felix H. Swope, was assessed, for general tax purposes, in the year 1915, at \$4,470; for 1916 at \$4,470; for 1917 at \$4,320. In 1916 for Meyer Boulevard at \$29,250. The tax bill against this property for this grading was \$7,540.20. Tract No. 11, belonging to B. Haywood Hagerman, was assessed, for general tax purposes, in the year 1915, at \$12,480; for 1916 at \$12,480; for 1917 at \$10,350. In 1916 for Meyer Boulevard at \$48,535. The tax bill against this property for this grading was \$12,511.60. Tract [fol. 236] No. 14, belonging to Carrie S. Abernathy, was assessed, for general tax purposes, in the year 1915, at \$6,400; for 1916 at \$6,400; for 1917 at \$6,400. In 1916 for Meyer Boulevard at \$24,920. The tax bill against this property for this grading was \$6,424. Tract No. 15, belonging to Carrie S. Abernathy, was assessed, for general tax purposes, in the year 1915, at \$6,000; for 1916 at \$6,000; for 1917 at \$6,000. In 1916 for Meyer Boulevard at \$24,570. The tax bill against this property for this grading was \$6,333.80. It will thus appear that for the year 1916 these tracts, in the aggregate, were assessed for general tax purposes at a value of \$40,340; that in the following year, after the Meyer Boulevard improvement, which is claimed to have added value in the way of benefits, had become a fixed fact, the same assessors assessed this same ground for general tax purposes at an aggregate of \$38,310; more than \$2,000 less than the previous year; that in 1916 these same tracts, in the aggregate, for the purposes of this grading, were assessed at \$188,680; a little less than five times the value at which they were assessed during the same year for general tax purposes. It further appears that the tax bills issued against these tracts, for this improvement, aggregate \$46,061; nearly \$6,000 more than the assessed valuation for general tax purposes in 1916, and nearly \$8,000 more than they were assessed for the same purposes in 1917. It further appears that these tracts, practically unimproved suburban property, were assessed to pay almost one-half of this entire improvement, at an average rate of over \$350 an acre.

Meyer Boulevard, with its heroic proportions, was conceived for the purpose of establishing an inspiring approach to Swope Park, the great playground of Kansas City, and incidentally as a thoroughfare into which, directly and indirectly, the boulevard system of Kansas City might discharge the throngs of pleasure seekers and [fol. 237] pleasure drivers who visit that park. It is altogether an appropriate and desirable enterprise for the gratification of the public at large, and its chief value is to the public at large, and to the city property to which it is tributary, and only very incidentally to the locality through which it passes. Notwithstanding this fact, the Board of Public Works assessed no part of the benefits against the city at large, nor against the property of the city, which would indirectly effect the same purpose, although that seems to have been



contemplated by Section 28, by the ordinance authorizing the improvement, and by the petition filed in the Circuit Court. That court, as shown by its order, may well have contemplated, and undoubtedly did contemplate, that a portion of the whole cost would be charged against the city. The Board of Public Works, however, imposed the entire burden upon the private property within the benefit district.

Many points are urged by complainants against the regularity of the proceedings and the validity of the tax bills. It is claimed that the method of apportionment provided for in Section 28 of Article 8 of the Charter, is fundamentally so unfair and unjust as to result in the taking of property without due process, in violation of the 14th Amendment to the Federal Constitution; that the tax assessed against the property in question exceeds the special benefits received to such an extent as to result in the taking of the property without due process; that this is a general public improvement, and not a local one; that the benefit district is unreasonable; that the Circuit Court proceeding is an essential step in the grading procedure, and was not followed with sufficient strictness, in that a suit was not brought in the name of Kansas City, and the parties charged were not named; [fol. 238] that that proceeding was, in effect, a moot one without recognition in the judicial procedure of the state, binds no one, and that the decree entered cannot be urged as *res adjudicata*. They also claim that the benefits were not apportioned equitably, and with due regard for actual benefits.

Defendants reply that the grading is of such a nature that its cost may lawfully be charged against a local benefit district; that the benefit district is a reasonable one; that distribution of cost in proportion to assessed valuation is a proper method of apportionment; that the amount of benefit to the particular tracts in question cannot be inquired into in this proceeding; that the suit in the Circuit Court is such a proceeding as comports with due process of law and affords sufficient opportunity to be heard on the questions involved; that Section 28 was duly complied with; that all questions raised, or which could have been raised, in the Circuit Court proceeding are now *res adjudicata*; and chiefly, that if a legislative body charges the cost of an improvement upon lands which it deems to have benefited therefrom, the courts must accept the legislative determination.

Both parties, in exhaustive and learned briefs, have cited abundant authority to sustain their several contentions and each of them, regard being had for the special facts, circumstances and emergencies which control the cases cited. It will serve no useful purpose, and it is beyond the limit of practical possibility in this memorandum, to analyze, discuss and distinguish the authorities adduced and the doctrines there announced. I am of opinion, that the Charter Section involved is susceptible of such arbitrary application as to amount, if such be the course pursued, in view of presumptions generally indulged and of the development of decisions, seeking carefully to preserve, and not too greatly to hamper the exercise of municipal sovereignty for the common good, to a burden upon private property

[fol. 239] almost, if not quite, to the point of confiscation. It may be that the suit as entitled would be held to conform analogously to city condemnation proceedings in general, but it must be confessed that the provisions for notice and hearing approach very closely to the frontier of judicial recognition. The proceeding in the Circuit Court is a mere adjunct to the legislative action of the council, and the issues made in that suit, if not wholly abstract in their nature, at least fall far short of contemplating a complete adjudication upon all matters with which those whose property is to be taken for public use are vitally concerned. "It may well be doubted (as said by Mr. Justice Brewer in *Tregea vs. Modesto Irrigation District*, 164 U. S. 179) whether the adjudication really binds anyone." However, I do not feel justified in going so far as to declare the Charter Section itself to be wholly unconstitutional and void; nor is this necessary. Counsel for defendants concede the settled rule to be that a state legislature, and, of course, a city council, may create taxing districts to meet the expense of local improvements, and may fix the basis of taxation without encountering the 14th Amendment unless its action is palpably arbitrary or a plain abuse. They say: "This legislative power is, however, not unlimited. It is subject to the limitation that its exercise must not be arbitrary or unreasonable." It must be admitted that:

"If the statute providing for the tax is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred the law cannot stand against the complaint of one so taxed in fact."

*Gast Realty Co. vs. Schneider Granite Co.*, 240 U. S., 55;

*Kansas City Southern Ry. Co., et al. vs. Road Improvement Dist. No. 6 of Little River Co., Ark.* (Supreme Court of the United States, decided June 6, 1921.)

[fol. 240] The defense contends, however, that complainants herein cannot raise this question because of the Circuit Court proceeding. To this I cannot agree. Finally, defendants concede that the fairness of the Assessor's valuation remains open to the consideration of whether it was arbitrary and unreasonable. I think this may be properly considered in connection with the action taken in defining the benefit district, and that when these two questions are disposed of it will be unnecessary to consider the other criticisms made and the defenses interposed.

What was done in this case appears clearly from the evidence as well as from common knowledge of procedure. It was desired to establish this super-boulevard, and it was realized that the expenditure would be entirely too burdensome if charged against the abutting property, as is usual in grading proceedings. Therefore, resort was had to Section 28 of Article 8, which was intended to relieve in a situation of this sort. But merely adopting the form prescribed by Section 28 does not necessarily afford such relief in practice.

Next, as appears from their testimony, the municipal representa-

tives, Boards and Council, felt themselves more or less circumscribed and limited by physical conditions. They did not feel justified in going beyond 63rd Street on the north and 67th Street on the south because of their conception of such physical conditions. They, therefore, deemed themselves confined to the restricted benefit district established. Now, while we may say that this involved the exercise of judgment and discretion in excluding property which was left out, all of which, in the condemnation proceeding, was deemed to be benefited by the establishment of this boulevard, there was very little exercise of judgment and discretion as to reasonable benefits respecting the territory included. The dominant idea was that the boulevard must be established in any event, and this benefit [fol. 241] district was arbitrarily selected to produce the funds. Although the improvement was primarily of benefit to the city at large, assessment against the city or its property was not considered because of the well known fact that the city had no funds which could be spared for this purpose. But the assessed valuation of the property in the benefit district for general tax purposes aggregates no more than the cost of this grading. This would never do, because such an assessment would be obvious confiscation, not of a single isolated lot, but of the entire benefit district. Therefore, an arbitrary assessment was made, presumably with the assistance of the same Assessor who makes the assessments for general tax purposes, amounting, as we have seen, to nearly five times the normal assessed valuation. Now, while property of this nature is not assessed at full valuation for general purposes, no one will contend that it is assessed at practically only one-fifth of its actual value. Thirty to forty per cent on city property would be the lowest acceptable figure. This property, for this improvement, is charged with considerably more than its entire assessed valuation for general tax purposes. It sufficiently appears that these tax bill-amount to more than one-third of the actual value, and that the benefit to complainants' property, if any, is negligible. Such assumed benefit is entirely speculative and bears no reasonable relation, any view, to the amount of the tax.

It appears that Meyer Boulevard lies to the south of these tracts and furnishes no direct thoroughfare to the city, which lies almost entirely to the north and west; besides, ample routes to the city, for all purposes, already exist. Swope Parkway, itself a very broad and commanding boulevard, runs along the eastern boundary; and 63rd street, up to that time a recognized thoroughfare, bounds most of these tracts upon the north.

[fol. 242] I find, for the reasons stated, as disclosed by the record, that both the benefit district and the assessment were arbitrary and unreasonable, and that the tax bills unreasonably exceed any possible benefit to this restricted benefit district.

The court is not unmindful of the necessity of recognizing liberal power in municipalities to provide for public improvements, even such as that under consideration, although this is not of the class, under the circumstances disclosed, which is essential to the public health and safety, which sometimes calls for the exercise of more arbitrary and summary municipal power. To uphold this proceeding

would be a practical recognition that the power of the city in such matters is unlimited, and that its exercise is not open to individual challenge in any case.

In *Norwood vs. Baker*, 172 U. S. 269, the Supreme Court of the United States said:

"In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. We say "substantial excess" because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment."

To this may be added the language of the Supreme Court of Missouri in *McCormack vs. Patchin*, 53 Mo. 33:

"The whole theory of local taxation or assessments is that the improvements for which they are levied afford a remuneration in the way of benefits. A law which would attempt to make one person, or a given number of persons, under the guise of local assessments, pay a general revenue for the public at large, would not be an exercise of the taxing power, but an act of confiscation."

And finally the language of Judge Agnew in the Washington Avenue [fol. 243] case, 69 Pa. State Reports, 352, is pertinent and applicable to the principle here involved.

"In questions of power exercised by agents, it is sometimes the misfortune of communities to be carried step by step, into the exercise of illegitimate powers, without perceiving the progression, until the usurpation becomes so firmly fixed by precedents it seems to be impossible to recede or to break through them."

This case is cited with approval in *Norwood vs. Baker*, 172 U. S. 285. The court is further mindful of the fact that the improvement has been made, the work has been done, the money has been spent and much of it probably has been advanced upon the faith of the validity of this proceeding; but this is always the case, and we must not lose sight of the fact that one of the arguments made in support of the insistence that complainants in this and similar cases have not been denied due process of law is that all defenses of this nature may be made in a suit upon the tax bills, or in proceedings like those at bar for the protection of those whose lands are taken or taxed for public purposes. In fact, complainants are practically remitted to this remedy.

It follows necessarily then that the present status of the parties who are charged with knowledge of the law and of the power of public officers, can, and should, have no controlling influence upon this decision.

The relief prayed by petitioners will be granted and decrees to that effect may be prepared and entered.

Kansas City, Missouri, June 28th, 1921.

Arba S. Van Valkenburgh, Judge.

[fol. 244]

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA, sct:

I, Edwin R. Durham, Clerk of the District Court of the United States for the Western Division of the Western District of Missouri, do hereby certify that the foregoing is a full, true and complete transcript of the record, assignments of error, and all proceedings in the case wherein Walter L. Abernathy and Carrie S. Abernathy are plaintiffs and McMillan Contracting Company and Fidelity National Bank and Trust Company of Kansas City are defendants, as fully as the same appears on file and of record in my office, in accordance with præcipes filed herein and made a part hereof.

I further certify that the original citation is prefixed hereto and returned herewith.

Witness my hand as Clerk, and the seal of said Court. Done at office in Kansas City, Missouri, this 30th day of June, A. D. 1922.

Edwin R. Durham, Clerk, By ———, Deputy Clerk.

(Seal of the United States District Court of Missouri, Western Division, Western District.)

Filed Jul. 10, 1922. E. E. Koch, Clerk.

[fol. 245] PER CURIAM OPINION—Filed Oct. 23, 1922

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 6134, September Term, A. D. 1922

McMILLAN CONTRACTING Co. et al., Appellants,

vs.

WALTER L. ABERNATHY et al., Appellees

Appeal from the District Court of the United States for the Western District of Missouri

No. 6135, September Term, A. D. 1922

McMILLAN CONTRACTING Co. et al., Appellants,

vs.

B. HAYWOOD HAGERMAN, Appellee

Appeal from the District Court of the United States for the Western  
District of Missouri

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No. 6136, September Term, A. D. 1922

FIDELITY NATIONAL BANK AND TRUST Co. et al., Appellants,

vs.

FELIX H. SWOPE et al., Appellees

Appeal from the District Court of the United States for the Western  
District of Missouri

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### Motions to Dismiss the Appeals

Mr. H. M. Langworthy (Mr. O. H. Dean, Mr. Roy B. Thomson and Mr. Melville W. Borders were with him on the brief), for appellees in No. 6134.

[fol. 246] Mr. A. S. Marley and Mr. W. H. Reed filed brief for appellees in No. 6135.

Mr. E. H. Jones (Messrs. Searritt, Jones, Seddon & North and Mr. Edward L. Searritt were with him on the brief), for appellees in No. 6136.

Mr. Justin D. Bowersock (Mr. Robert B. Fizzell, Mr. Arthur Miller, Mr. Maurice H. Winger, Mr. Clarence S. Palmer, Mr. Frank P. Barker and Mr. G. V. Head, were with him on the brief), for appellants.

Before Lewis and Kenyon, Circuit Judges, and Munger, District  
Judge

Per Curiam:

Motions to dismiss the appeals in these cases have been made, upon the ground that the appeals could be taken only to the Supreme Court of the United States. The suits sought to have decrees entered declaring certain assessments and levies of special taxes against land in Kansas City, Missouri, to have been illegally imposed, and declaring them to be no lien against the land of the complainants.

The asserted grounds for relief were, that a portion of the state statutes of Missouri, known as the Kansas City charter, and the city ordinance enacted to carry into effect this portion of the charter were in violation of the constitution of the United States, and also that this and other provisions of this charter and ordinance were not followed in the proceeding leading to the assessments.

The jurisdiction of the court in the first two cases to entertain the case depended upon the assertion of the conflict of the local statutes with the Constitution of the United States, as there was no allegation of diversity of citizenship nor allegation of any other ground of jurisdiction. The decree was in favor of the complainants. It is settled that where the jurisdiction of the court depends only upon the ground that the cause of action arises under the Constitution of the United States, the Circuit Court of Appeals has no jurisdiction to review the case, as an appeal in such a case must be sought in the Supreme Court of the United States, under Sections 128 and 238 of the Judicial Code. *American Sugar Refining Co. v. New Orleans*, [fol. 247] 181 U. S. 277, 281; *Huguley Mfg. Co. v. Galeton Cotton Mills*, 184 U. S. 290, 295; *Union and Planters' Bank v. Memphis*, 189 U. S. 71, 73; *Vicksburg v. Waterworks Co.*, 202 U. S. 453, 458; *Carolina Glass Co. v. South Carolina*, 240 U. S. 305, 318; *Raton Water Works Co. v. Raton*, 249 U. S. 552, 553; *Lemke v. Farmers' Grain Co.*, — U. S., —, 42 Sup. Ct. Rep. 244; *Grammer v. Fenton*, 268 Fed. 943, 945.

In the third case now before the court, No. 6136, the jurisdiction of the court was invoked upon the same assertions of a violation of the Constitution of the United States, and also because of diversity of citizenship of the parties. In such a case an appeal lies to the Circuit Court of Appeals. *American Sugar Refining Co. v. New Orleans*, 181 U. S. 277, 281; *Lemke v. Farmers' Grain Co.*, — U. S. —, 42 Sup. Ct. Rep. 244; *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397, 407. A further ground urged for the dismissal of case No. 6136 is a failure of appellants to have the case docketed within the period limited as the return day. The record was received by the clerk of this court within that period, but because the docket fee was not then paid, the case was not docketed for several days after the return day. No injury is shown to have occurred to appellees because of this delay and no motion to dismiss the appeal was made before the case was docketed. The delay is therefore no ground for dismissal. *Equitable Life Assur. Co. v. Tolbert*, 145 Fed. 338, 339; *Gould v. United States*, 205 Fed. 883, 885. The motion to dismiss appeal in No. 6136 will be denied.

In the other two cases our attention has been called to the Act of Congress approved September 14, 1922, adding Section 238a to the Judicial Code, which reads as follows:

"If an appeal or writ of error has been or shall be taken to, or issued out of, any Circuit Court of Appeals in a case wherein such appeal or writ of error should have been taken to or issued out of the Supreme Court, or if an appeal or writ of error has been or shall be taken to, or issued out of, the Supreme Court in a case wherein



such appeal or writ of error should have been taken to, or issued out of, a Circuit Court of Appeals, such appeal or writ of error shall not for such reason be dismissed, but shall be transferred to the proper court, which shall thereupon be possessed of the same and shall proceed [fol. 247½] to the determination thereof, with the same force and effect as if such appeal or writ of error had been duly taken to, or issued out of, the court to which it is so transferred."

Appellees claim that no transfer of these cases to the Supreme Court should be ordered under this statute, because the appeals were not applied for within three months after the entry of the decree (Sec. 6, Ch. 448, 39 Stats. 726) and therefore that the Supreme Court would have no jurisdiction to entertain the appeal. This is a question that is more properly determined by the court whose authority is questioned. An order will be entered transferring the appeals in cases numbered 6134 and 6135 to the Supreme Court of the United States.

[File endorsement omitted.]

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[fol. 248] UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH  
CIRCUIT, SEPTEMBER TERM, 1922

Monday, October 30, 1922.

[Title omitted]

#### ORDER TRANSFERRING CAUSE

This cause came on to be heard on the motion of appellees for an order dismissing the appeal herein, and was argued by counsel.

On consideration whereof and of the provisions of the Act of Congress approved September 14, 1922, adding Section 238A to the Judicial Code, and this Court being of the opinion that the appeal in this cause should be transferred to the Supreme Court of the United States, It is now here ordered by this Court that said appeal be, and the same is hereby, transferred to the Supreme Court of the United States in pursuance of said Act of Congress, and the Clerk of this Court is hereby directed to transmit to said Supreme Court the transcript of the record as received from the District Court of the United States for the Western District of Missouri, together with a certified copy of this order and of the opinion of this Court herein, without making charge for said transcript of record which is certified by the Clerk of the District Court.

October 30, 1922.

[fol. 249]

## CLERK'S CERTIFICATE

## UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript of record consisting of pages A, B, and 1 to 244 inclusive, is the transcript of the record received from the District Court of the United States for the Western Division of the Western District of Missouri in the case of McMillan Contracting Company, a corporation, et al., Appellants, vs. Walter I. Abernathy, et al., and filed and docketed in said Circuit Court of Appeals on July 10, 1922, as No. 6134.

I do further certify that said transcript of record is hereby transmitted to the Supreme Court of the United States pursuant to the opinion and order of said Circuit Court of Appeals filed and entered on October 23 and 30, 1922, respectively, and of which full, true and complete copies are hereto attached.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 24th day of November, A. D. 1922.

E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. [Seal of the United States Circuit Court of Appeals, Eighth Circuit.]

[Endorsed:] U. S. Circuit Court of Appeals, Eighth Circuit, September Term, 1922. No. 6134. McMillan Contracting Company, et al., Appellants, vs. Walter I. Abernathy, et al. Transcript of Record from Circuit Court of Appeals under Act of Congress approved September 14, 1922.

Endorsed on cover: File No. 29,286. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 167. McMillan Contracting Company and Fidelity National Bank & Trust Company of Kansas City, Appellants, vs. Walter L. Abernathy and Carrie S. Abernathy. Filed December 16th, 1922. File No. 29,286.

[fol. 250] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

## STIPULATION AS TO PRINTING RECORD—Filed Aug. 17, 1923

It is hereby stipulated between the parties hereto that the evidence and proceedings at the trial of the above entitled case, including the opinion of the trial court, were identical with the evidence and pro-

ceedings at the trial in the case of McMillan Contracting Company and Fidelity National Bank and Trust Company, Appellants, v. B. Haywood Hagerman, Appellee, No. 168, pending in this Court, said cases having been tried and submitted together, though not consolidated, and that the record in said cause No. 168 includes all the evidence taken and proceedings had at the trial in this cause, and that the Clerk of this Court shall include in the printed record in the above entitled case No. 167, without further comparison, a copy of the evidence, proceedings at the trial and opinion in said case No. 168, in lieu of the evidence, proceedings at the trial and opinion in this case No. 167, with the same force and effect as if the entire record as filed in this case No. 167, were duly printed in accordance with the rules. All of the record in this case, No. 167, except the evidence, proceedings at the trial and opinion shall be printed just as if this stipulation had not been entered into.

This stipulation shall not effect the relative setting of the two cases [fol. 251] on the docket of this court.

Justin D. Bowersock, Arthur Miller, Sam'l J. McCulloch,  
Attorneys for Appellants. O. H. Dean, H. M. Langworthy,  
Roy B. Thomson, Attorneys for Appellees.

[fols. 252 & 253] [Endorsed:] 167/29286. In the Supreme Court of the United States. McMillan Contracting Company and Fidelity National Bank and Trust Company, v. Walter L. Abernathy and Carrie S. Abernathy. Stipulation.

[fol. 254] [File endorsement omitted.]

No. 107

IN 1922

**Supreme Court of the United States**

OCTOBER TERM, 1922

**McMILLAN CONTRACTING COMPANY AND  
FIDELITY NATIONAL BANK AND TRUST  
COMPANY OF KANSAS CITY,  
APPELLANTS,**

**VS.**

**WALTER L. ABERNATHY AND CARRIE S.  
ABERNATHY, APPELLEES.**

**APPELLEES' ANSWER TO APPELLANTS'  
MOTION TO REMAND TO CIRCUIT  
COURT OF APPEALS**

**O. S. Davis,**

**Attorney for Appellees.**

**W. F. Smith,**

**Attorney for Appellants.**

No. 736.

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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1922.

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McMILLAN CONTRACTING COMPANY AND  
FIDELITY NATIONAL BANK AND TRUST  
COMPANY OF KANSAS CITY,  
APPELLANTS,

VS.

WALTER L. ABERNATHY AND CARRIE S.  
ABERNATHY, APPELLEES.

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**APPELLEES' ANSWER TO APPELLANTS'  
MOTION TO REMAND TO CIRCUIT  
COURT OF APPEALS.**

Appellants in their motion to remand to the Circuit Court of Appeals for the Eighth Circuit, stated that the Circuit Court of Appeals "entered an order transferring the appeal to the Supreme Court under the terms of an Act of Congress approved January 14, 1922, amending the Judicial Code by adding thereto Section 238A." We submit that appellants are in error in this interpretation of the judgment of the Circuit Court of Appeals in this case.

Instead of transferring the case to this court under the terms of said Act, the case was transferred so that this court could have an opportunity of passing on its own jurisdiction. Upon this point the Circuit Court of Appeals says (284 Fed. l. c. 356) :

"Appellees claim that no transfer of these cases to the Supreme Court should be ordered under this statute, because the appeals were not applied for within three months after the entry of the decree (Section 6, c. 448, 39 Stats. 726; Comp. St. Sec. 1228a), and therefore that the Supreme Court would have no jurisdiction to entertain the appeal. This is a question that is more properly determined by the court whose authority is questioned. An order will be entered transferring the appeals in cases numbered 6134 and 6135 to the Supreme Court of the United States."

The parties to this suit have an adjudication from the Circuit Court of Appeals holding specifically that that court is without jurisdiction of this case. This judgment of the Appellate Court has not been appealed from, nor been brought to this court in any way, and such judgment is binding upon the parties. The appellants by this motion have attempted to reopen in this court the question of the jurisdiction of the Appellate Court, which we submit is contrary to the fundamental purpose of the statutes relating to appeals.

Thus in *State of Ohio ex rel. Seney v. Swift & Co.*, 43 Supreme Court Reporter, 22 (Case No. 67, October Term, 1922), this court said :

"Section 128, Judicial Code (Comp. St., Sec. 1120) provides that Circuit Courts of Appeals shall

exercise appellate jurisdiction over final decisions of District Courts in all classes of cases except those wherein appeals and writs of error may be taken directly to the Supreme Court."

"Section 238, Judicial Code (Comp. St., Sec. 1215) provides that appeals and writs of error may be taken from final judgments of the District Courts directly to the Supreme Court when jurisdiction of the court is in issue, in prize causes, cases involving the construction or application of the Constitution of the United States, etc."

"The Act of March 3, 1891, from which these sections take their origin, has been uniformly construed as intended to distribute jurisdiction among the Appellate Courts, prevent successive appeals, and relieve the docket of this court. If appellant, in the way now attempted, can secure two reviews of a cause wherein he has presented to the court below no controverted question except the jurisdictional one, a fundamental purpose of the statute will be frustrated. *Robinson v. Caldwell*, 165 U. S. 359, 362, 17 Sup. Ct. 343, 41 L. Ed. 745; *Loeb v. Trustees of Columbia Township*, 179 U. S. 472, 478, 21 Sup. Ct. 174, 45 L. Ed. 280; *Union & Planters' Bank v. Memphis*, 189 U. S. 71, 73, 74, 23 Sup. Ct. 604, 47 L. Ed. 712; *Carolina Glass Co. v. State of South Carolina*, 240 U. S. 305, 318, 36 Sup. Ct. 293, 60 L. Ed. 658; *El Banco Popular, etc. v. Wilcox*, 255 U. S. 72, 75, 41 Sup. Ct. 312, 65 L. Ed. 510; *The Carlo Poma*, 255 U. S. 219, 221, 41 Sup. Ct. 309, 65 L. Ed. 594; *Alaska Pacific Fisheries v. Territory of Alaska*, 249 U. S. 53, 60, 61, 39 Sup. Ct. 208, 63 L. Ed. 478."

"And we accordingly hold that, whenever the suitor might have come here directly from the District Court upon the sole question which he chose to controvert in the Circuit Court of Appeals, the judgment of the latter becomes final, and we cannot entertain an appeal therefrom."



The brief submitted by the appellants in support of their motion to remand is virtually the same as the brief submitted by them in the Circuit Court of Appeals in opposition to appellees' motion to dismiss and is based upon the contention that appellate jurisdiction was determined by all of the questions in the case and not upon the question which gave the United States Court jurisdiction and go so far as to state (page 9), that "It may then be laid down as an established principle that the jurisdiction of the Supreme Court to entertain and determine direct appeals from the District Court is not affected in any way whatsoever by the grounds of jurisdiction of the District Court."

This is the very question passed upon by the Circuit Court of Appeals adversely to appellants and which appellants endeavor again to present to this court.

We submit that the contention is entirely untenable and is contrary to the numerous decisions of this court cited in our memorandum attached to our motion to dismiss.

Appellants continue to refer to a so-called "trap" in which they find themselves. We submit that the situation is one which naturally presents itself whenever an appellant attempts to appeal after the expiration of approximately six months to the Circuit Court of Appeals when appellate jurisdiction is not given in such a case to that court.

We respectfully submit that appellants' motion to remand should be denied and that the appeal should be *dismissed*.

O. H. DEAN,  
H. M. LANGWORTHY,  
ROY B. THOMSON,  
M. W. BORDERS,  
*Attorneys for Appellees.*

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1923.

---

McMILLAN CONTRACTING COM-  
PANY, a corporation, and FIDEL-  
ITY NATIONAL BANK AND  
TRUST COMPANY OF KANSAS  
CITY, a corporation,

*Appellants*

v.

No. 167

WALTER L. ABERNATHY and CAR-  
RIE S. ABERNATHY,

*Appellees.*

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**Appellants' Supplemental Brief on Motion  
to Dismiss.**

Since the filing of Appellants' brief on the motion to dismiss, there have been certain decisions of this court and of the Circuit Courts of Appeals construing the statute of September 14, 1922, amending the judicial code by adding thereto Section 238a. Appellants respectfully pray leave of the Court to submit this supplemental brief referring to these additional authorities.

In the case of *Pothier v. Rodman*, decided by this Court on March 12, 1923, and reported in 43 S. Ct. 374, this court entered an order transferring said case to the Circuit Court of Appeals for the First Circuit, pursuant to the Act of September 14, 1922. The appeal in the case had been taken from the District Court for the District of Rhode Island direct to this Court when it should have gone to the Circuit Court of Appeals for the First Circuit.

The case of *Wagner Electric Mfg. Co. v. Lyndon*, decided by this Court on May 21, 1923, and reported in 43 S. Ct. 589, is of particular importance. The Wagner Company brought suit in the United States District Court for the Eastern Division of Missouri against Lyndon and the Sheriff of the City of St. Louis, seeking to enjoin the Sheriff from paying over to Lyndon certain money collected by the Sheriff on a judgment rendered in the State Court against the Wagner Company. The District Court, on the 1st day of August, 1921, dismissed the bill on the ground that no Federal question was raised. The Wagner Company appealed to the Circuit Court of Appeals on the 17th day of October, 1921, which Court affirmed the decree of the District Court on July 7, 1922. A petition for rehearing was filed, which was denied by the Circuit Court of Appeals on September 18, 1922. The Wagner Com-

pany then appealed from the decision of the Circuit Court of Appeals to this Court.

This Court decided that an appeal from the decision of the District Court lay only to this Court and not to the Circuit Court of Appeals, and that but for the Act of September 14, 1922, it would be the duty of this Court to reverse the decree of the Circuit Court of Appeals with directions to dismiss the appeal; but this Court retained jurisdiction of the case and decided the same on the merits pursuant to Section 238a. Chief Justice Taft in rendering the opinion of the Court, discussed the effect of the Act as follows:

“The decree of affirmance in the Circuit Court of Appeals was entered on July 7, 1922, but a petition for rehearing was filed, and that petition was not denied until September 18, 1922, or four days after the passage of the foregoing act. Before the decree of affirmance became finally the act of the Circuit Court of Appeals, this law came into force, and, however that may be, it is in force now to govern us in the direction which we, in reversing the decree of affirmance, should give to that court. That direction should be to transfer the case to this court, to which it should have been brought by direct appeal from the District Court, under section 238 of the Judicial Code.

The case is here on appeal allowed by a judge of the Circuit Court of Appeals. The case has been submitted to us on the motion to dismiss or affirm, which is a hearing on the merits. All parties have filed briefs. Is it necessary for us to go through the idle form of remanding it to the Circuit Court of Appeals, to enable that court to transfer it back to us for a second consideration? Certainly such unnecessary consumption of time and labor is not in the spirit of the Act of September 14, 1922. Having the case here, and having heard it on the merits, we think we may properly consider that done which ought to have been done, treat the case as here by appeal from the District Court, and dispose of it, as we would do if the Circuit Court of Appeals had formally transferred it to us."

This decision seems to put at rest all the objections urged by the Appellees to the application of the Act of September 14, 1922, to the present case.

In the case of *Hoffman v. McClelland*, 284 Fed. 837, the Circuit Court of Appeals for the Fifth Circuit transferred to this Court under the Act of September 14, 1922, a case appealed to the Circuit Court of Appeals, of which only this Court had appellate jurisdiction.

In the case of *Bianchi v. Morales*, 288 Fed. 194, a similar transfer was made by the Circuit Court of Appeals for the First Circuit.

The Circuit Court of Appeals for the Fifth Circuit applied the Act in a similar manner in the case of *McLean Oil Company v. Ashworth Heirs*, 289 Fed. 73.

Respectfully submitted,

JUSTIN D. BOWERSOCK,  
ARTHUR MILLER,  
SAM'L J. McCULLOCH,  
FRANK P. BARKER,  
G. V. HEAD,  
*Attorneys for Appellants.*





APR 9

WM. R. S.

IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1922.

McMILLAN CONTRACTING COMPANY, a  
corporation, and FIDELITY NATIONAL  
BANK AND TRUST COMPANY OF  
KANSAS CITY, a corporation,

*Appellants.*

v.

No. 

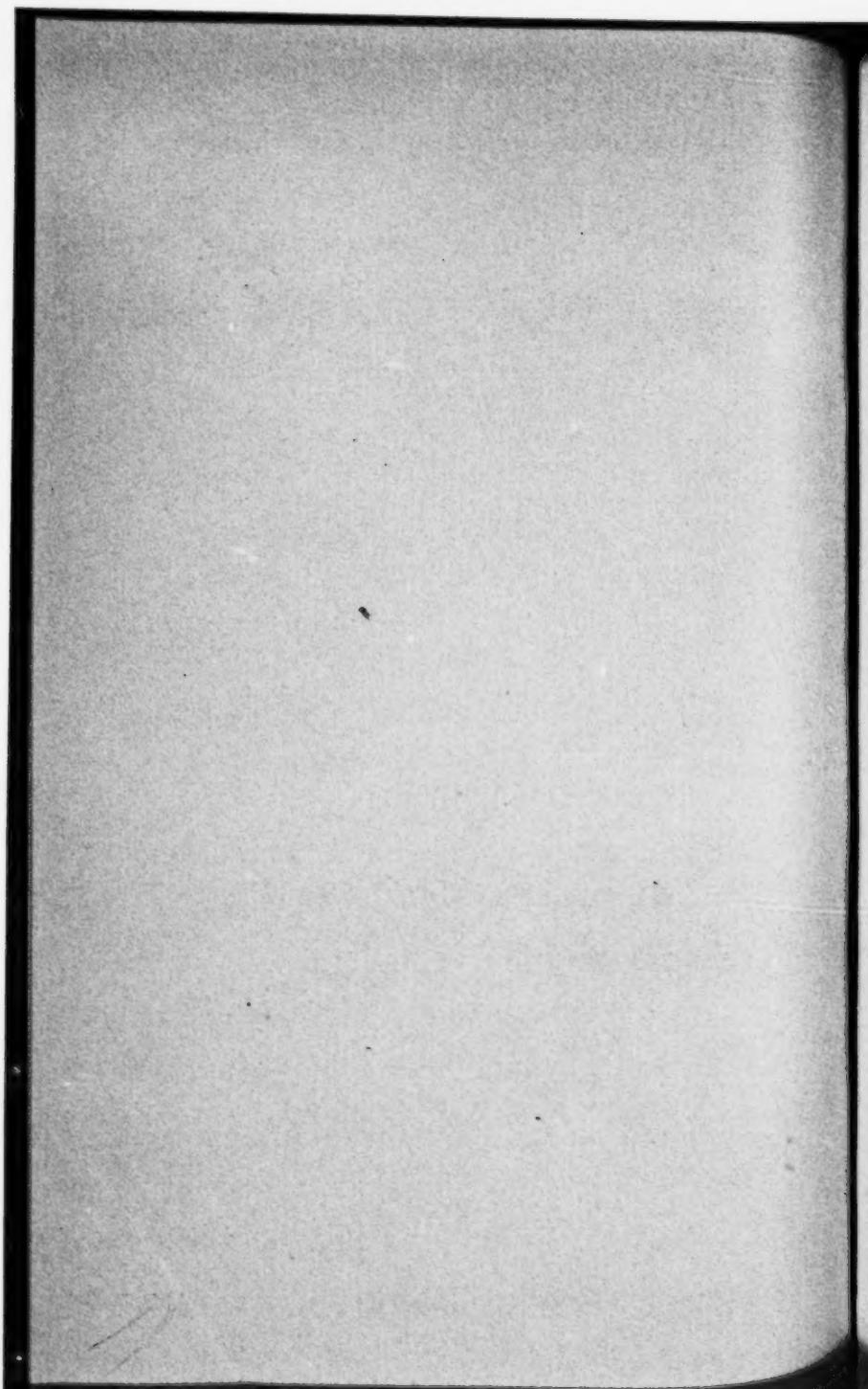
WALTER L. ABERNATHY and CARRIE S.  
ABERNATHY,

*Appellees.*

Appellants' Motion to Remand  
and Memorandum in Support Thereof.

JUSTIN D. BOWERSOCK,  
ARTHUR MILLER,  
SAM'L J. McCULLOCH,  
FRANK P. BARKER,  
G. V. HEAD,

*Attorneys for Appellants.*



IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1922.

---

McMILLAN CONTRACTING COMPANY, a  
corporation, and FIDELITY NATIONAL  
BANK AND TRUST COMPANY OF  
KANSAS CITY, a corporation,

*Appellants.*

v.

No. 736

WALTER L. ABERNATHY and CARRIE S.  
ABERNATHY,

*Appellees.*

---

**NOTICE OF APPELLANTS' MOTION TO REMAND.**

To Walter L. Abernathy and Carrie S. Abernathy, Appellees, and to O. H. Dean, H. M. Langworthy, Roy B. Thomson and Melville W. Borders, their attorneys of record:

You and each of you are hereby notified that on Monday, the ~~2nd~~<sup>1st</sup> day of April, 192~~2~~<sup>3</sup>, at the convening of Court or as soon thereafter as counsel can be heard, the undersigned will present and submit to the Supreme Court of the United States, a motion to remand the above entitled cause to the United States Circuit Court of Appeals for the Eighth Circuit, and memorandum in support thereof. A true copy of

appellants' motion to remand and of the memorandum in support thereof are hereto attached and made a part hereof.

JUSTIN D. BOWERSOCK,  
ARTHUR MILLER,  
SAM'L J. McCULLOCH,  
FRANK P. BARKER,  
G. V. HEAD,

*Attorneys for Appellants.*

Service of the foregoing notice and a copy of the motion to remand and memorandum in support thereof therein referred to is hereby acknowledged this 29th day of March, 1923.

O. H. DEAN,  
H. M. LANGWORTHY,  
ROY B. THOMSON,  
MELVILLE W. BORDERS,

*Attorneys for Appellees.*

IN THE  
**Supreme Court of the United States.**

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McMILLAN CONTRACTING COMPANY, a  
corporation, and FIDELITY NATIONAL  
BANK AND TRUST COMPANY OF  
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*Appellants,*

v.

No. 736

WALTER L. ABERNATHY and CARRIE S.  
ABERNATHY,

*Appellees.*

---

**APPELLANTS' MOTION TO REMAND.**

Come now the appellants above named and respectfully move the Court to remand this cause to the United States Circuit Court of Appeals for the Eighth Circuit, for the following reasons, to-wit:

1. This is a suit in equity instituted in the District Court of the United States for the Western District of Missouri, for the purpose of having certain tax bills, issued by Kansas City, Missouri, adjudged null and void and to have them removed as a cloud on appellees' title, upon three grounds set up in the bill: That the Charter of Kansas City and the ordinance authorizing the issuance of the bills are in contravention of the

4

constitution of the United States; that the Charter and ordinance were not complied with; and that the Charter itself was violated in the issuance of the bills. The answers put in issue all these grounds.

2. The case therefore involved three questions: A claim that a state law is in violation of the United States Constitution; a claim that the Kansas City Charter was not complied with; and a claim that the Charter had been violated. The jurisdiction of the District Court was rested upon the first claim.

3. On July 7, 1921, the District Court entered a final decree in favor of the appellees, adjudging the tax bills to be null and void.

4. Within six months thereafter, and on January 4, 1922, appellants duly filed in the District Court their petition for appeal from said decree to the United States Circuit Court of Appeals for the Eighth Circuit, which said petition was duly allowed by the District Court and said appeal duly granted on January 4, 1922. Said appeal was thereafter duly filed and docketed in said Circuit Court of Appeals, and all necessary steps were taken for the due hearing of said appeal in said court.

5. Thereafter the appellees filed in said Circuit Court of Appeals their motion to dismiss said appeal upon the ground that said court had no jurisdiction to hear and determine the same, and on October 23, 1922, said Court, being of the opinion that it had no jurisdiction of said appeal, but that said appeal should have been taken direct to the Supreme Court of the United States, entered an order transferring the

appeal to the Supreme Court under the terms of the Act of Congress approved September 14, 1922, amending the Judicial Code by adding thereto Section 238a.

6. In consideration of the fact that the jurisdiction of the United States Circuit Court of Appeals, under Sections 128 and 238 of the Judicial Code depends upon the nature of the questions involved in the suit and not upon the grounds of jurisdiction of the District Court, and by reason of the fact that there are in this case three questions involved, one coming within the jurisdiction of the Supreme Court under Section 238, and two coming within the jurisdiction of the Circuit Court of Appeals under Section 128, appellants allege that the Circuit Court of Appeals for the Eighth Circuit had jurisdiction of said appeal; that said appeal was properly taken and allowed to said court, and that said court should have overruled the motion to dismiss and proceeded to hear and determine said appeal in due course.

Wherefore, appellants pray that this cause be remanded to the United States Circuit Court of Appeals for the Eighth Circuit with instructions to hear and determine the appeal herein, or that this Court in its discretion under the terms of Section 239, 240 and 262 of the Judicial Code, proceed to hear and determine the same as upon certificate from said Circuit Court of Appeals.

JUSTIN D. BOWERSOCK,  
ARTHUR MILLER,  
SAM'L J. McCULLOCH,  
FRANK P. BARKER,  
G. V. HEAD,

*Attorneys for Appellants.*



IN THE  
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v.

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ABERNATHY,

*Appellees.*

---

**MEMORANDUM FOR APPELLANTS ON MOTION TO  
REMAND.**

The order of the Circuit Court of Appeals for the Eighth Circuit, transferring the case to this Court, was based upon the Act of Congress, approved September 14, 1922, providing in effect that when an appeal has been taken to the wrong appellate court, it shall not be dismissed but shall be transferred to the right appellate court. The Court of Appeals held that the appeal in this case should have been taken to the Supreme Court, that the Court of Appeals was the wrong appellate court and that the case was one coming within the

terms of the act. We contend that the appeal was properly taken to the Court of Appeals.

The position of the appellees in the Circuit Court of Appeals and the holding of that court in transferring the case to the Supreme Court was that, since the jurisdiction of the District Court rested solely on the claim that a law of the state of Missouri is in controvention of the Federal Constitution, the Circuit Court of Appeals was without jurisdiction of the appeal.

In answer to this contention, appellants urge that under the Federal statutes and decisions, the grounds of jurisdiction of the District Court are not the criterion of appellate jurisdiction but that the latter depends upon the nature of the questions involved in the case.

It will be seen that appellants were confronted with the dilemma and are possibly caught in the "trap" referred to by Chief Justice Taft in an address to the American Bar Association at San Francisco, reported in the Journal of American Bar Association for October, 1922, at page 603, a trap created by the attempt of the statute to define the appellate jurisdiction of each court and by the language of the Supreme Court in certain cases hereinafter cited, interpreting that statute. We most earnestly urge that a fair consideration of the actual points decided by the Supreme Court and a slight modification of its language in a few cases, will do away with the trap so far as affects this appeal and assure appellants a hearing upon the merits, either in the Circuit Court of Appeals or in this Court.

We contend first that the appeal was properly taken; and second that, if it was not, it was properly certified here under the act of September 14, 1922.

## I.

Section 238 of the Judicial Code provides that direct appeals may be taken from the District Court to the Supreme Court (1) in any case in which the jurisdiction of the District Court is in issue, the question of jurisdiction alone being certified to the Supreme Court; (2) from the final sentences and decrees in prize causes; and (3) in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States. For present purposes at least, this section constitutes the entire authority of the Supreme Court to entertain appellate jurisdiction.

This section contains no word referring even remotely to the grounds of jurisdiction of the District Court. The right of appeal to the Supreme Court is based wholly on the character of the case or of the questions raised therein. Cases where the jurisdiction of the District Court *is in issue*; prize causes, cases that *involve* the Constitution, or in which constitutionality is *drawn in question*, or in which a law is *claimed* to be unconstitutional—these are the requirements laid down by the statute for a direct appeal. If construction is necessary to sustain this reading, the Supreme Court has several times so construed the section.

*Holder v. Aultman*, 169 U. S., 81, 18 S. Ct., 269;  
*Loeb v Columbia Township Trustees*, 179 U. S., 472  
21 S. Ct., 174;  
*Boise Water Co. v. Boise City*, 230 U. S., 84, 33 S. Ct.,  
997.

Other cases to the same effect, but touching more exactly the main question under the motion, will be referred to hereafter.

It may, then, be laid down as an established principle that the jurisdiction of the Supreme Court to entertain and determine direct appeals from the District Courts is not affected in any way whatsoever by the grounds of jurisdiction of the District Courts. There is no case to the contrary.

## II.

Section 128 of the Judicial Code provides that the Circuit Courts of Appeals shall exercise appellate jurisdiction to review decisions of the District Courts "in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred thirty-eight." This would seem, at first blush, to be equally clear with Section 238. There is no reference whatsoever to grounds of jurisdiction of the District Courts. There is the simple provision that appeal lies to the Circuit Courts of Appeals in all cases in which it does not lie to the Supreme Court, the question being dependent entirely upon the character of the case or of the questions raised therein.

## III.

It was undoubtedly the "intention of the act in general that appellate jurisdiction should be distributed." *American Sugar Refining Co. v New Orleans*, 181 U. S. 277, 21 S. C.,

646. It may have been the intention to make the two sections mutually exclusive. But the Supreme Court has determined otherwise, and it may now be considered as established by the decisions of this Court:

(a) That where the *only question involved* is one covered by Section 238, the Supreme Court has exclusive jurisdiction of an appeal from the District Court.

*Union & Planters Bank v Memphis*, 189 U. S. 71,  
23 S. Ct., 604;

*Vicksburg v Water Works Co.*, 202 U. S., 453, 26  
S. Ct., 660;

*Carolina Glass Co. v South Carolina*, 240 U. S., 305,  
36 S. Ct., 293;

*Raton Water Works Co. v. Raton*, 249 U. S. 552,  
39 S. Ct., 384.

(b) That where the *only question involved* is one not covered by Section 238, the proper Circuit Court of Appeals has exclusive jurisdiction of an appeal from the District Court.

*Sugarman v United States*, 249 U. S., 182, 39, S.  
Ct., 191.

(c) That where two or more *questions are involved*, one of which is covered by Section 238, and one of which is not, then an appeal will lie to either court, neither being ousted of its jurisdiction because of the presence of questions which would give the other jurisdiction. To this extent, the appellate jurisdiction of the two courts is concurrent.

*Robinson v Caldwell* 165 U. S., 359, 17 S. Ct., 343;

- Carter v Roberts*, 177 U. S., 496, 20 S. Ct., 713;  
*Loeb v Columbia Township Trusees*, 179 U. S.,  
 472, 21 S. Ct., 174;  
*Spreckles Sugar Refining Co. v McClain*, 192 U. S.,  
 397, 24 S. Ct., 376;  
*Macfadden v United States*, 213 U. S., 288, 29 S.  
 Ct., 490;  
*Pomona v Sunset Tel. Co.*, 224 U. S. 330, 32 S. Ct.,  
 477;  
*Lemke v Farmers' Grain Co.*, 42 S. Ct., 244.

In *Robinson v Caldwell*, 165 U. S., 359, 17 S. Ct., 343 the defendant appealed direct from the Circuit Court to both the Circuit Court of Appeals and to the Supreme Court. The former heard and determined the appeal before it. The Supreme Court thereupon dismissed the appeal pending before it, in spite of the presence in the record of questions authorizing a direct appeal to it, namely, the construction of a treaty and the constitutionality of a Federal statute.

*Carter v. Roberts*, 177 U. S., 496, 20 S. Ct., 713, involved two questions: The construction of a Federal statute and its constitutionality. The defendant appealed to both courts. The Circuit Court of Appeals heard and determined the cause. The Supreme Court declined to take jurisdiction under the direct appeal, holding that under the circumstances it had jurisdiction only on certiorari or appeal from the Circuit Court of Appeals. The court says, (p. 500):

“When cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this court, and if such cases are carried to the circuit courts of appeals, those courts may decline to take jurisdiction, or **where**

**such construction or application is involved with other questions,** may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance."

In *Loeb v Columbia Township Trustees*, 179 U. S., 472, 21 S. Ct., 174, the bill presented only a case of diversity of citizenship. The defendant by demurrer raised the question of constitutionality. The Supreme Court upholds its jurisdiction of a direct appeal, though stating that plaintiff might have appealed to the Circuit Court of Appeals.

The bill in *Spreckles Sugar Refining Co. v McClain*, 192 U. S., 397, 24 S. Ct., 376, alleged both the unconstitutionality of a Federal revenue act and also its misconstruction by the enforcing officers. In sustaining a writ of error to the Circuit Court of Appeals and a writ of error from that court to the Supreme Court, the latter holds that an appeal might go direct to either court.

In *Macfadden v U. S.*, 213 U. S., 288, 29 S. Ct., 490, on writ of error to the Circuit Court of Appeals from the Supreme Court, it is again laid down that if there is a *question involved* giving the former jurisdiction on appeal, that jurisdiction is not ousted because of a question warranting direct appeal to the Supreme Court. The Court reiterates that in such cases, appeals might be taken to either court.

To the same effect is *Pomona v Sunset Tel. Co.*, 224 U. S., 330, 32 S. Ct., 477.

And in *Lemke v Farmers Grain Co.*, 42 S. Ct., 244 a case relied on by appellees, and to which we shall refer later the *holding* of the Supreme Court is that where there is a **question involved** giving the Circuit Court of Appeals jurisdiction



and also one giving the Supreme Court jurisdiction, an appeal may go to either.

#### IV.

The case at bar is one coming within the rule discussed in paragraph (c) of Point III above. It involves (subject to the contention made herein under Point VI) a claim that the law of a state is in contravention of the Constitution of the United States, under Section 238; and it unquestionably involves two entirely independent claims: one that the provisions of the Charter of Kansas City have been violated; and the other that the charter and ordinances of the city have not been complied with. These issues are all tendered by the bill itself and are met by the answers.

The bill is one to have certain tax bills issued by Kansas City declared null and void and to have them removed as a cloud on plaintiffs' title. The bill alleges that the tax bills are void for three distinct reasons; first, that the charter of Kansas City and the ordinance under which the tax bills purport to have been issued, are in violation of the Constitution of the United States (Paragraph 10); second, that the charter and ordinance were not complied with, in that a certain suit required therein to be filed was not filed (Paragraphs 5, 7 and 10); third, that Section 28 of Article VIII of the charter was violated in the issuance of the bills (Paragraph 11).

These were the issues upon which the case was tried, evidence was heard upon them all, the trial court considered them all and held the tax bills void. The decree does not specify the grounds upon which the court acted. The opinion of the court shows that the charter and ordinance were not held unconstitutional, but that the tax bills were deemed to be

confiscatory because of the method of carrying the charter provisions into effect. However, the grounds of action of the trial court could not in any way affect the question of appellate jurisdiction.

It is evident, therefore, that the case is one which under the authorities might be appealed to either this Court or the Circuit Court of Appeals (subject to the contention herein made under Point VI). Granting for the moment that the claim that the charter and ordinance were in contravention of the United States Constitution is *bona fide* and substantial, an appeal would lie to the Supreme Court under Section 238. There being also two questions not covered by Section 238, namely, the issue as to compliance with the charter and ordinance in the matter of the suit to be filed, and the issue as to the violation of Section 28 of Article VIII of the charter, an appeal would lie to the Circuit Court of Appeals under Section 128.

These several questions are not interdependent; none of them arise incidentally; the solution of one does not in any way affect or depend upon the others. They bring the case clearly within the language and ruling of the authorities cited in paragraph (c) of point III above. It follows that the appeal was properly taken to the Court of Appeals in spite of the claim that appellants might have taken it direct to the Supreme Court.

## V.

To combat this conclusion, appellees rely upon the language of five opinions in the Supreme Court in cases passing upon this question of appellate jurisdiction. These cases are:

- American Sugar Refining Co. v New Orleans*, 181 U. S., 277, 21 S. Ct., 646;  
*Union & Planters' Bank v Memphis*, 189 U. S., 71 23 S. Ct., 604;  
*Carolina Glass Co. v South Carolina*, 240 U. S., 305, 36 S. Ct., 293;  
*Raton Water Works Co. v Raton*, 249 U. S., 552, 39 S. Ct., 384;  
*Lemke v Farmers' Grain Co.*, 42 S. Ct., 244.

We may submit that there is language in all these opinions seeming to lend weight to appellees' contention—a contention that appellate jurisdiction direct from the District Courts depends, not upon the questions involved but upon the grounds of jurisdiction in the District Court. The contention, unless established by the language referred to, is utterly without any basis whatsoever in the statutes or in the authorities.

As said by the Supreme Court in *Macfadden v U. S.* 213 U. S., 288, 29 S. Ct., 490, "the language of the opinion should be interpreted in the light of the facts of the case." With this caution in mind, we ask a consideration of the five decisions relied upon by appellees.

1. In *American Sugar Refining Co. v New Orleans*, 181 U. S., 277, 21 S. Ct., 646, the suit was originally filed in the state court and was removed to the United States Court solely because of diversity of citizenship. A constitutional question was raised in defense. The case was taken to the Circuit Court of Appeals on writ of error, which was dismissed by that court because a constitutional question was involved. On certiorari to the Supreme Court, the question was whether the

Court of Appeals had jurisdiction to dispose of the writ of error. The Supreme Court held that it had.

The decision is clearly right, and in line with the principles stated in Point III above. The constitution being involved, an appeal would have been proper to the Supreme Court. Diversity of citizenship being involved, an appeal was proper to the Circuit Court of Appeals. The Supreme Court does say that there is a right to appeal to either court in cases where *jurisdiction* below is rested both on citizenship and on a constitutional question. But if we interpret that language in the light of the fact that diversity of citizenship and constitutionality were the issues involved in the case, we have no right to draw the inference that those constitute the *only* basis for appeal to either court.

2. *Union & Planters' Bank v Memphis*, 189 U. S., 71, 23 S. Ct., 604, is a case in which appeals were taken from the Circuit Court both to the Circuit Court of Appeals and to the Supreme Court. The Court of Appeals heard the case and entered a judgment from which, also, an appeal was prosecuted to the Supreme Court. The latter considered together the direct appeal from the Circuit Court and the appeal from the Court of Appeals. The Supreme Court decided the case upon the direct appeal, reversing the judgment of the Circuit Court of Appeals, not upon the merits, but because the appeal was not within the jurisdiction of the latter court.

The decision is clearly right. The only question involved in the case is that a state law is in-contravention of the United States Constitution. That question gave the Supreme Court jurisdiction under Section 238, and there was no diversity of citizenship or other question bringing the appeal under the terms of Section 128. The jurisdiction of the Supreme Court was therefore exclusive.

There is language in the opinion discussing the grounds of jurisdiction alleged in the bill. But the court's attention was not challenged to the matter. The language is appropriate to the exact question presented by the record and it should be so interpreted. Under the facts of that case, the *questions involved* and the *grounds of jurisdiction* of the Circuit Court were identical. The sole question involved was the claim of unconstitutionality; the sole ground of jurisdiction of the Circuit Court was the claim of unconstitutionality. The decision is that the single claim of unconstitutionality gave the Supreme Court exclusive jurisdiction on appeal. The language should not be given wider significance.

3. Again in *Carolina Glass Co. v South Carolina*, 240 U. S., 305, 36 S. Ct., 293, a case very similar so far as procedure is concerned to *Union & Planters' Bank v Memphis*, the sole question involved was the constitutional question, which was as well the sole question on which jurisdiction was alleged. The decision is unquestionably right. The Supreme Court had exclusive jurisdiction under Section 238 and the Circuit Court of Appeals therefore had none under Section 128. The language of the opinion should be interpreted in the light of the facts of the case.

4. *Raton Water Works Co. v Raton*, 249, U. S., 552, 39 S. Ct., 384, is a similar case. The jurisdiction of the District Court was based entirely on a claim that a law of a state was unconstitutional. This was also the only question involved. Upon appeal to the Circuit Court of Appeals for this Circuit, the question of appellate jurisdiction was certified to the Supreme Court. The latter court properly held that the Circuit Court of Appeals had no jurisdiction of the appeal. The lan-

guage of the opinion refers to the basis of jurisdiction of the District Court, because that was the exact situation presented by the facts. The sole basis of jurisdiction, however, and the sole question involved were in that case identical and the language should not be applied to a different case.

5. *Lemke v Farmers Grain Co.*, 42 S. Ct., 244, is, we believe, the last case on the subject. In that case, the bill alleged the unconstitutionality of a state law and also its repugnancy to a federal statute. Here, therefore, were two questions involved; first, was the state law constitutional; second, was it repugnant to the federal statute. The same two questions went to the jurisdiction of the District Court in the first instance—the jurisdiction of the District Court might rest on either. The Supreme Court holds that an appeal would lie to the Circuit Court of Appeals, and from the Circuit Court of Appeals to the Supreme Court under Section 128. This is clearly in line with the established doctrine.

Again, however, language is used capable of too broad application. The case did present two questions raised on the bill,—constitutionality and repugnancy to a federal statute, each of which constituted a basis for jurisdiction in the District court. The Supreme Court says that where jurisdiction is invoked solely upon constitutional grounds the appeal must go to the Supreme Court, but that where jurisdiction is invoked also upon other federal grounds it may go to the Court of Appeals.

If this language is interpreted in the light of the facts, it is defensible and correctly states the law. If on the other hand, it is interpreted to mean that in every case appellate jurisdiction is dependent upon the grounds invoked by the bill, it is contrary to the terms of the statutes themselves and of

a line of Supreme Court decisions construing those statutes. As to the jurisdiction of the Supreme Court, it has been directly and conclusively decided by the authorities cited herein under Point I and many others, that the grounds alleged in the bill are utterly immaterial. So far, at least, under all the cases, the language of *Lemke v. Farmers Grain Co.*, is wrong, if interpreted as placing the question upon the grounds of jurisdiction of the District Court.

6. As to the jurisdiction of the Circuit Court of Appeals, the very cases cited in *Lemke v. Farmers Grain Co.*, indicate conclusively that the language must not be so broadly interpreted; and there are other decisions to the same effect.

The case of *Loeb v. Columbia Township Trustees*, 179 U. S., 472, 21 S. Ct., 174, is the earliest authority we have found directly considering this matter. In that case, jurisdiction of the Circuit Court was rested on diversity of citizenship alone. A constitutional question arose on demurrer, and a writ of error was taken direct from the Supreme Court. That court holds that its jurisdiction under the statute depends not at all on the grounds alleged in the petition as giving the trial court jurisdiction, but wholly on the fact that a constitutional question is involved. The Court expressly points out a distinction between the provisions of the statute covering direct appeals to the Supreme Court and to the Courts of Appeals, and the provisions of the statute relative to appeals from the Courts of Appeals themselves to the Supreme Court. In the latter case *only* are the grounds of jurisdiction of the trial court mentioned or referred to in the statute. The questions are disposed of in the following manner:

“The petition shows that the parties are citizens of different states. It states no other ground of Federal



jurisdiction. If nothing more appeared bearing upon the question of jurisdiction, then it would be held that this court was without authority to review the judgment of the circuit court." (Page 477).

"It is said that, even if the record shows such a claim to have been made, it will not avail the plaintiff; for, it is argued, when the jurisdiction of the circuit court is invoked by the plaintiff only on the ground of diverse citizenship, a claim, by the defendant of the repugnancy of a state law to the Constitution of the United States is not sufficient to give this court jurisdiction, upon writ of error, to review the final judgment of the circuit court sustaining such claim. Such an interpretation of the 5th section is not justified by its words. Our right of review by the express words of the statute extends to 'any case' of the kind specified in the 5th section. And the statute does not in terms exclude a case in which the Federal question therein was raised by the defendant. " (Page 477).

"It is true that the plaintiff might have carried this case to the circuit court of appeals, and, a final judgment having been rendered in that court upon his writ of error, he could not thereafter have invoked the jurisdiction of this court upon another writ of error to review the judgment of the circuit court." (Page 478).

**"When the question is whether a judgment of the circuit court of appeals is final in a particular case, it may well be that the jurisdiction of the circuit court is, within the meaning of that section, to be regarded as dependent entirely upon the diverse citizenship of the parties if the plaintiff invoked the authority of that court only upon that ground; because in such case the jurisdiction of the court needed no support from the averments of the answer, but attached and became complete upon the allegations of the petition. But no such test of the jurisdiction of this court to review the final judgment of the circuit court is prescribed by the 5th section. Our jurisdiction depends only on the inquiry whether that judgment was in a case in which it was**

claimed that a state law was repugnant to the Constitution of the United States." (Page 479).

Following the Loeb case and directly in line with it, is *Spreckles Sugar Refining Co. v McClain*, 192 U. S., 397, 24 S. Ct., 376. The bill in that case was not based on diversity of citizenship either in whole or in part. It alleged the unconstitutionality of a federal revenue act and also a misconstruction thereof. On error to the Circuit Court of Appeals, it is held that the appeal might have gone to either court. In a very clear and logical presentation of the principles governing its action, the Supreme Court says, (Page 407):

"Was the judgment of the circuit court subject to review only by this court, or was it permissible for the plaintiff to take it to the circuit court of appeals? If the case, as made by the plaintiff's statement, had involved no other question than the constitutional validity of the act of 1898, or the construction or application of the Constitution of the United States, this court alone would have had jurisdiction to review the judgment of the circuit court. *Huguley Mfg. Co. v Galeson Cotton Mills*, 184 U. S. 291, 295, 46 L. Ed. 546, 549, 22 Sup. Ct. Rep., 452. But the case distinctly presented other questions which involved simply the construction of the act; and those questions were disposed of by the circuit court at the same time it determined the question of the constitutionality of the act. If the case had depended entirely on the construction of the act of Congress—its constitutionality not being drawn in question—it would not have been one of those described in the 5th section of the act of 1891, and, consequently, could not have come here directly from the circuit court. **As, then, the case made by the plaintiff involved a question other than those relating to the constitutionality of the act and to the application and construction of the Constitution, the circuit court of appeals had jurisdiction to review the judgment of the circuit court, although, if the**

plaintiff had elected to bring it here directly, this court would have had jurisdiction to determine all the questions arising upon the record. The plaintiff was entitled to bring it here directly from the circuit court, or, at its election, to go to the circuit court of appeals for a review of the whole case. Of course, the plaintiff, having elected to go to the circuit court of appeals for a review of the judgment, could not thereafter, if unsuccessful in that court upon the merits, prosecute a writ of error directly from the circuit court to this court. *Robinson v Caldwell*, 165 U. S., 359, 41 L. Ed. 745, 17 Sup. Ct. Rep., 343; *Loeb v Columbia Twp.*, 179 U. S., 472, 45 L. Ed., 280, 21 Sup. Ct. Rep., 174; *Ayers v. Polsdorfer*, 187 U. S., 585, 47 L. Ed., 314, 23 Sup. Ct. Rep., 196."

The Court then proceeds to discuss the provisions of Section 128, relative to appeals from the Circuit Court of Appeals to the Supreme Court, as to which the grounds of jurisdiction of the trial court are expressly made material by the statute. The entire opinion of the court on the question of appellate jurisdiction (pp. 405-410) is in accord with our position in this memorandum.

These two cases were confirmed by *Macfadden v. U. S.*, 213 U. S., 288, 29 S. Ct., 490. That was on indictment under a federal statute. A constitutional question became involved later. On error to the Circuit Court of Appeals, the Supreme Court holds that either court had jurisdiction on appeal. The basis of appellate jurisdiction is again pointed out by the court and it is again denied that the grounds of jurisdiction alleged in the bill have any bearing on the question. The Court says, (Page 293):

"Assuming, without decision, that the constitutional questions were real and substantial, it is clear that a

writ of error might have been sued out originally directly from this court under clause 5. *Loeb v. Columbia Twp.*, 179 U. S., 472, 45 L. Ed., 280, 21 Sup. Ct. Rep., 174. But this was not done, and by the appeal to the circuit court of appeals, the right of direct appeal here was lost. *Robinson v. Caldwell*, 165 U. S., 359, 41 L. Ed., 745, 17 Sup. Ct. Rep., 343.

Section 6 of the act provides that the circuit courts of appeal shall exercise appellate jurisdiction 'in all cases other than those provided for in the preceding section of this act;' and the fact that there were in the case questions which would have warranted a direct appeal to this court does not deprive the circuit court of appeals of its jurisdiction. *American Sugar Ref. Co. v. New Orleans*, 181 U. S., 277, 45 L. Ed., 859, 21 Sup. Ct. Rep., 646. In the case at bar the circuit court of appeals has assumed jurisdiction and rendered judgment. May the petitioner have a writ of error directed to that judgment? The answer to this question depends upon whether the judgment of the circuit court of appeals was final. The act contemplated that certain judgments of the circuit court of appeals might be reviewed on writ of error in this court, and that certain other judgments could not be so reviewed. The line of division is marked in §6 of the act. **It is to be observed that the line of division between cases appealable to this court and those appealable to the circuit court of appeals, made by § 5 of the act, is based upon the nature of the case or of the questions of law raised.** But the line of division between cases appealable from the circuit court of appeals to this court and those not so appealable, drawn by § 6, is different, and is determined, not by the nature of the case or of the question of law raised, but by the sources of jurisdiction of the trial court, namely, the circuit court or the district court,—whether the jurisdiction rests upon the character of the parties or the nature of the case. *Huguley Mfg. Co. v. Galetton Cotton Mills*, 184 U. S. 290, 46 L. Ed., 546, 22 Sup. Ct. Rep., 452, where it was said by the chief justice,

citing cases, 'the jurisdiction referred to is the jurisdiction of the circuit court as originally invoked.' The difference in the test for determining whether a case is appealable from the trial court directly to this court, and the test for determining whether a case is appealable from the circuit court of appeals to this court, is important, and a neglect to observe it leads to confusion."

The case of *Pomona v Sunset Tel. Co.*, 224 U. S., 330 32 S. Ct., 477, is directly in line with these authorities. The Court says, at page 342 of the opinion:

"This is a bill brought by the appellee, a California corporation, to restrain the city of Pomona from removing the appellee's poles and wires from the streets of the city, and from preventing the appellees placing further poles and wires in the streets. The circuit court dismissed the bill (164 Fed., 561), but the decree was reversed and an injunction granted by the circuit court of appeals (97 C. C. A., 251, 172 Fed., 829). Two of the grounds originally relied upon were that the appellee, being a telegraph as well as a telephone company, had rights under the act of Congress of July 24, 1866, Chap. 230, 14 Stat. at L. 221 (Rev. Stat. § 5263 *et seq.* U. S. Comp. Stat. 1901, p. 3579), that were infringed, and that the conduct of the city had given rise to a contract. These are no longer pressed, but they warranted taking the case to the circuit court of appeals. *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S., 397, 407, 48 L. Ed. 496, 499, 24 Sup. Ct Rep., 376. The remaining ground is that the Constitution of California, as amended in 1911, or the statutes of the state, contained a grant with which the Constitution of the United States does not permit the city to interfere. This is the only argument pressed here. Unless the appellee got a grant from one of these two sources, it has no right to occupy the streets."

Not one of these cases has ever been questioned or its holding modified in anyway and two of them, *Spreckels Sugar Refining Co. v. McClain* and *Pomona v Sunset Tel. Co.*, are cited as authorities in *Lenke v. Farmers' Co.*, 42 S. Ct., 244, relied on by appellees.

In view of the plain terms of the statute and of the unquestioned soundness of these authorities, we submit that the language of the Supreme Court in the cases apparently adverse must be read as that court itself demands in the light of the issues presented in those cases. To read the language otherwise, throws the decisions upon an important matter of appellate jurisdiction into conflict and confusion; to read it so, harmonizes the authorities and makes the provisions of the statute clear and comprehensive.

A very strong presentation of the question will be found in an article by Charles W. Bunn, Esq., of St. Paul, Minn., in 35 Harvard Law Review 902.

## VI.

**It is by no means clear that there is a constitutional question involved in this appeal sufficient to bring the case to the Supreme Court direct from the District Court. It is quite possible that appellants would have found themselves in as great difficulty if they had taken the other horn of the delimma by appealing to this Court,**

The 14th Amendment protects against *state* action only. Admittedly, the act of a city is, in the proper case, an act of the state within the meaning of the Amendment. However,

the action of the city can be imputed to the state only when the municipality is acting within the scope of its delegated powers. A bill which alleges that the acts in question were outside the scope of the city's authority, does not invoke the 14th Amendment.

*Barney v. New York*, 193 U. S., 430, 24 S. Ct. 502.

Paragraph 5 of the bill very definitely avers that by reason of the failure of the city to comply with Section 29 of Article VIII of the charter, with respect to the suit in the circuit court required by that section,

"the Board of Park Commissioners was without right or authority to let a contract for said work, and the Board of Public Works was without right or power to apportion or levy the cost of said work against the lands in said benefit district, or to issue tax bills for such work against said lands."

Again in paragraph 11 of the bill appears the following:

"Complainants state that the taxing of their lands, which are far removed from and have no access to or use of said boulevard, at the same rate as the lands immediately fronting on and particularly benefited by said boulevard, was in violation of said Section 28 of Article VIII of the Kansas City Charter, which requires that the tax for such grading costs shall be laid 'in proportion to the benefits accruing to the several parcels of land' in the benefit district, and was palpably discriminatory, inequitable and unjust."

Such allegations do not invoke the 14th Amendment, but, on the contrary, prevent its application.

*Hamilton Gas Light Co. v. Hamilton City*, 146 U. S., 258, 13 S. Ct., 95;



*Barney v. New York*, 193 U. S., 430, 24 S. Ct., 502;  
*Siler v Louisville & N. Ry. Co.*, 213 U. S., 175, 29  
 S. Ct., 451;

*Memphis v. Cumberland Tel. & Teleg. Co.*, 218 U.  
 S., 624, 31 S. Ct., 115.

The allegations in the bill with regard to the lack of proper service of process on the appellees in the Circuit Court suit brought by the city in purported compliance with the charter, raise no constitutional question. An allegation that the judgment of a state court is violative of due process because the court was without jurisdiction to render the judgment, does not invoke the 14th Amendment.

*Carey v. Houston & Texas Ry. Co.*, 150 U. S., 170  
 14 S. Ct., 63;

*Cornell v. Green*, 163 U. S., 75, 16 S. Ct., 969;

*Cosmopolitan Mining Co. v. Wash.*, 193 U. S., 460,  
 24 S. Ct., 489;

*Burt v. Smith*, 203 U. S., 129, 27 S. Ct., 37;

*Empire State-Idaho Mining Co. v. Hanley*, 205 U.  
 S., 225, 27 S. Ct., 476;

*Childers v. McClaghry*, 216 U. S., 139, 30 S. Ct.,  
 370.

The bill also contains allegations to the effect that complainants' constitutional rights were violated because under the charter and ordinance no opportunity was afforded complainants for a hearing upon the amount and apportionment of the benefits accruing from the improvement, and upon the valuation fixed by the city assessor upon complainants'

property. That these features of the assessment proceeding do not involve a violation of due process of law has been repeatedly held by the United States Supreme Court and the Supreme Court of Missouri; and under such circumstances such allegations do not raise a federal question.

The construction or application of the federal constitution must be *substantially* involved. It must *clearly* and *necessarily* be drawn in question.

*Goodrich v Ferris*, 214 U. S., 71, 29 S. Ct., 580;  
*O'Callaghan v O'Brien*, 199 U. S., 89, 25 S. Ct., 727;  
*Empire State-Idaho Mining Co. v Hanley*, 205 U. S.,  
 225, 27 S. Ct., 476.

And if the point raised has already been definitely passed upon by the courts, and the constitutionality sustained, the averments with reference to a violation of due process of law will not invoke the jurisdiction of the court.

*Brolan v. U. S.*, 236 U. S., 216, 35 S. Ct., 285;  
*Manhattan Life Ins. Co. v. Cohen*, 234 U. S., 123,  
 34 S. Ct., 874;  
*Knop v. Monogahela etc. Co.*, 211 U. S., 485, 29  
 S. Ct., 188.

There are also allegations that the tax bills in question are confiscatory. But the averments as to this point are not sufficient to raise a question under the 14th Amendment. In *American Sugar Refining Co. v. U. S.*, 211 U. S., 155, 29 S. Ct., 89, the court says:

"We concur with counsel for the government that, if the construction or application of the Constitution of

the United States, within the meaning of § 5, Act of 1891, is involved in every case where one claims that, according to his interpretation of a statute, excessive duty or tax has been demanded by executive officers, \* \* \* this court must entertain direct appeals from the circuit court in most tariff and tax controversies; which we regard as out of the question."

It would appear from these authorities that while the jurisdiction of the District Court may have been based by the bill solely upon the alleged constitutional question, no such question was actually involved so as to justify an appeal direct to this Court.

## VII.

Appellees have filed a motion to dismiss this appeal upon the ground that the Circuit Court of Appeals had no jurisdiction of it and that appellants are not entitled to the benefit of the Act of September 14, 1922. We submit that the Court of Appeals did have jurisdiction; that if so, the Act of September 14, 1922, does not apply; and that the case should therefore, be remanded to that court or retained here for determination as upon certificate from said Court of Appeals under Sections 239, 240 and 262 of the judicial Code.

If, however, this Court shall be of opinion that the Appeal was taken to the wrong court, then we contend that the terms of the Act of September 14, 1922, do apply, that they are valid and that under them this court should proceed to hear and determine the merits. Our contentions and au-

thorities on this point are contained in our memorandum filed in opposition to the motion to dsmiss therein.

Respectfully submitted,

JUSTIN D. BOWERSOCK,

ARTHUR MILLER,

SAM'L J. McCULLOCH,

FRANK P. BARKER,

G. V. HEAD,

*Attorneys for Appellants.*

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No. 736.

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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1922.

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McMILLAN CONTRACTING COMPANY AND  
FIDELITY NATIONAL BANK AND TRUST  
COMPANY OF KANSAS CITY,  
APPELLANTS,

VS.

WALTER L. ABERNATHY AND CARRIE S.  
ABERNATHY, APPELLEES.

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**APPELLEES' REPLY TO APPELLANTS' BRIEF  
ON MOTION TO DISMISS.**

The scope of the discussion and the number of cases cited by appellants prevent a discussion of all of these cases without the extension of briefs to undesirable lengths. We will, therefore, confine ourselves at this place largely to a reference to the principles involved.

It is, of course, apparent that the case at bar was not certified to this Honorable Court by the Circuit Court of Appeals to pass upon any question relating to the jurisdiction of the Appellate Court, as contemplated by



Section 239, Judicial Code. The Court of Appeals decided the question of its own jurisdiction, and merely certified the case to this court, so that this court would have an opportunity of passing upon its own jurisdiction. No appeal or other proceedings have been taken by the appellants, asking for a review of the decision of the Court of Appeals, and therefore, its decision denying its jurisdiction stands.

It may be assumed that where a court has jurisdiction over the parties and subject-matter in a particular case that changes may properly be made with respect to procedure. Many cases are cited by appellants in support of this principle. If the District Court in the case at bar had granted an appeal within the three months period while that court had jurisdiction over the appeal, the cases referred to by appellants might have been applicable. Thus in the case of *Smith v. Chytraus*, 152 Ill. 654, and as a part of the quotation from that case on page 7 of Appellants' Brief, we find:

"The court then, when it granted an appeal to the Appellate Court, was acting judicially in respect to a matter that was specially committed to its charge by the statute. It had jurisdiction of the parties and of the subject-matter, and what it did, although it may have been erroneous was not absolutely void and of no effect."

It is maintained by the appellants that the case of *Freeborn v. Smith*, 2 Wall. 160, is in effect a controlling authority on the present motion. We submit that that case is no authority for a decision of the case at bar,

for in the first place the controversy arose and the decision of this court was rendered prior to the enactment of the Fourteenth Constitutional Amendment; and second, this court had jurisdiction of the appeal which was later disturbed by subsequent legislation, and the statute in question was merely a modification of that legislation leaving the court with the jurisdiction that it had formerly possessed.

Appellants also cite cases tending to hold that acts granting applicants rights of further review in questions relating to citizenship are sustained. It is difficult to see the application of such cases to the case at bar, for in such cases, the legislation might give a new right or extend the old right without effecting any adverse interests.

In *Freeland v. Williams*, 131 U. S. 405, cited by appellants, this conclusion was expressed by the court on page 416:

"We are of opinion that the Constitution of West Virginia of 1872 in its provision for this class of cases does not violate the obligation of a contract where the judgment was founded on a tort committed as an act of public war."

It is difficult to see the application of such a doctrine to the questions here involved.

The position of the appellants if maintained would require a construction of the Act of September 14, 1922, Section 238-A of the Judicial Code, to be construed in such a way that a litigant would have six months within which to appeal to this court instead of three months.

The appellant would only be required to appeal to the Court of Appeals within six months, and then ask the latter court to transfer the case to this court, and this in spite of the fact that the Court of Appeals be without jurisdiction. We submit that this is not a reasonable construction of this act, and was not intended by Congress to have such effect. Had the appeal been granted within the three months period from the time of the rendition of the judgment while the District Court had jurisdiction to grant an appeal to the proper tribunal an entirely different situation would have been presented. In the case at bar, the District Court lost jurisdiction after the expiration of three months, and its acts thereafter were a nullity.

In 15 C. J., 853, it is said:

"Where a court is without jurisdiction in the premises, its acts and proceedings can be of no force or validity as where jurisdiction is denied by the constitution. If jurisdiction did not exist at the time when action was taken, a subsequent enlargement of the jurisdiction of the court to an extent which would authorize what was done, cannot cure the effect or render the action previously taken valid."

We submit that the motion to dismiss should be sustained.

O. H. DEAN,  
H. M. LANGWORTHY,  
ROY B. THOMSON,  
M. W. BORDERS,  
*Attorneys for Appellees.*

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IN THE

**Supreme Court of the United States**

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McMILLAN CONTRACTING COMPANY AND  
FIDELITY NATIONAL BANK AND TRUST  
COMPANY OF KANSAS CITY,  
APPELLANTS,

VS.

WALTER L. ABERNATHY AND CARRIE S.  
ABERNATHY, APPELLEES.

APPELLEES' MOTION TO DISMISS APPEAL  
AND MEMORANDUM IN SUPPORT  
THEREOF.

O. H. DEAN,  
H. M. LANGWORTHY,  
ROY B. THOMSON,  
MELVILLE W. BORDERS,  
*Attorneys for Appellees.*

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IN THE  
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McMILLAN CONTRACTING COMPANY AND  
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COMPANY OF KANSAS CITY,  
APPELLANTS,

VS.

WALTER L. ABERNATHY AND CARRIE S.  
ABERNATHY, APPELLEES.

**NOTICE OF APPELLEES' MOTION TO  
DISMISS APPEALS.**

*To McMillan Contracting Company, and Messrs. Arthur Miller, Frank P. Barker and Clarence S. Palmer, its Attorneys, and Fidelity National Bank and Trust Company of Kansas City, and Mr. Justin D. Boxersock, its Attorney of Record;*

You, and each of you, are hereby notified that on Monday, <sup>March 5<sup>th</sup></sup> ~~February 26<sup>th</sup>~~ 1923, at the convening of court, or as soon thereafter as counsel can be heard, the undersigned will present and submit to the Supreme Court of the United States a motion to dismiss appeals and memorandum in support thereof, praying the



Honorable The Supreme Court of the United States to make an order dismissing the appeals in the above entitled cause a true copy of the appellees' motion to dismiss appeals and memorandum in support thereof are hereto attached and made a part hereof.

O. H. DEAN,  
H. M. LANGWORTHY,  
ROY B. THOMSON,  
MELVILLE W. BORDERS,  
*Attorneys for Appellees.*

Service of the foregoing notice of submission and a copy of the motion to dismiss appeals and brief in support thereof are hereby acknowledged this .... day of February, 1923.

.....,  
.....,  
.....,  
.....,  
*Attorneys for Appellants.*

**No. 136.**

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IN THE

# **Supreme Court of the United States**

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OCTOBER TERM, 1922.

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McMILLAN CONTRACTING COMPANY AND  
FIDELITY NATIONAL BANK AND TRUST  
COMPANY OF KANSAS CITY,  
APPELLANTS,

VS.

WALTER L. ABERNATHY AND CARRIE S.  
ABERNATHY, APPELLEES.

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## **APPELLEES' MOTION TO DISMISS APPEALS.**

Come now Walter L. Abernathy and Carrie S. Abernathy, appellees (complainants below), and appearing specially for the purposes of this motion and without any intention to appear generally, and without intending to waive the question of the jurisdiction of this Honorable Court, move the court to dismiss the appeals of McMillan Contracting Company and Fidelity National Bank and Trust Company (defendants below), for the following reasons, to-wit:

1. This is a suit in equity originally instituted in the District Court of the United States for the Western Division of the Western District of Missouri, for the purpose of having certain alleged special tax bills upon the land of the complainants in Kansas City, Missouri, purporting to have been levied under the laws of the State of Missouri, adjudicated and declared illegal and void, because such alleged taxes, if enforced, would deprive the complainants of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, a copy of which first amended bill of complaint, under which said suit was tried, is included in the transcript of said cause heretofore filed in this court, to which reference is hereby made.

2. That the jurisdiction of the United States District Court in said cause rested solely upon an attack upon a state statute and provisions of the Charter of Kansas City, Missouri, because of their alleged violation of the Federal Constitution.

3. That on July 7th, 1921, said District Court of the United States rendered final judgment and decree in favor of said complainants, adjudging said alleged special tax bills upon the property of the complainants, to be null and void, because contrary to and in violation of the provisions of the Federal Constitution.

4. That no petition for a rehearing of said cause by said District Court was ever presented or filed by the defendants therein or either of them, and that no action of any kind whatsoever was taken questioning the final-

ity of said judgment and decree except the attempted appeal hereinafter set out.

5. That thereafter and on January 4th, 1922, and more than three months after the rendition of final judgment or decree by the said District Court, defendants McMillan Contracting Company and Fidelity National Bank and Trust Company filed petition for appeal from said final judgment of said District Court to the United States Circuit Court of Appeals in and for the Eighth Circuit, and said District Court on said January 4th, 1922, and contrary to the statutes authorizing appeals from said court, made and entered of record an order allowing said appeals to said United States Circuit Court of Appeals.

6. That thereafter there was filed in said Circuit Court of Appeals by appellees herein, a motion to dismiss said attempted appeals for want of jurisdiction of said appellate court, with suggestions in support of said motion, a copy of which said motion to dismiss and suggestions filed in support thereof are hereto attached for convenient reference by the court.

7. That thereafter, and in answer to the contention of appellants, as indicated in a memorandum filed by them, these appellees filed in said Circuit Court of Appeals a memorandum of supplemental authorities, a copy of which is also attached hereto for convenient reference by the court.

8. That thereafter, and on October 23rd, 1922, said Court of Appeals made and entered of record an order and decree finding that it had no jurisdiction of

said purported appeals and transferred the cause to this Honorable Court to determine the question of its own jurisdiction, a copy of which said order and decree is hereto attached for convenient reference by the court.

9. That by virtue of the facts as herein stated, and as more fully shown by the abstract in said cause now on file, neither the Court of Appeals nor this Honorable Court did, and neither court could under the facts of this case, acquire jurisdiction over said cause by virtue of said attempted appeals.

Wherefore, said appellees pray this Honorable Court to make an order dismissing said appeals.

O. H. DEAN,  
H. M. LANGWORTHY,  
ROY B. THOMSON,  
MELVILLE W. BORDERS,  
*Attorneys for Appellees.*

No. 736.

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1922.

McMILLAN CONTRACTING COMPANY AND  
FIDELITY NATIONAL BANK AND TRUST  
COMPANY OF KANSAS CITY,  
APPELLANTS,

VS.

WALTER L. ABERNATHY AND CARRIE S.  
ABERNATHY, APPELLEES.

**MEMORANDUM IN SUPPORT OF MOTION TO  
DISMISS THE APPEALS.**

I.

The jurisdiction of the United States District Court in this cause rested solely upon the alleged violation of the Federal Constitution in the levying of special taxes under the laws of the State of Missouri, upon the property of the appellees (complainants below) in Kansas City, the amended bill of complaint under which the case was tried containing the following allegations with re-

spect to the jurisdiction of the United States District Court, to-wit:

"Now come complainants, Walter L. Abernathy, and Carrie S. Abernathy, and for their cause of action against defendants, and each of them, allege as follows, to-wit:

1. That at and before the filing of the original bill of complaint, complainants were and now are husband and wife, and residents and citizens of Jackson County, Missouri, and defendants, and each of them, were and now are corporations duly organized under and by virtue of the laws of the State of Missouri, and residents and citizens of the State of Missouri, and of the Western District thereof, with their principal offices at Kansas City, Jackson County, Missouri.

2. That this court has jurisdiction of said cause, for the reason that said action is of a civil nature in equity; that the matter and amount in controversy, exceeds, exclusive of interest and costs, the sum or value of three thousand (\$3000.) dollars, as hereinafter more fully set forth; that said controversy arises under the Constitution of the United States, and particularly the Fourteenth Amendment thereof, as hereinafter more fully set forth."

Thereafter, said complaint alleges specifically the ways and manner in which the levying of the special taxes in this case under the laws of the State of Missouri violated the provisions of the Federal Constitution.

The District Court adjudged said special taxes invalid, unconstitutional and void, because said taxes were levied in violation of the Federal Constitution, and the learned Chancellor, Judge Van Valkenburgh, in the



course of his memorandum opinion filed in said cause, says in part :

"It is claimed that the method of apportionment provided for in Section 28 of Article 8 of the Charter, is fundamentally so unfair and unjust as to result in the taking of property without due process, in violation of the Fourteenth Amendment to the Federal Constitution; that the tax assessed against the property in question exceeds the special benefits received to such an extent as to result in the taking of the property without due process."

The court in said opinion further says :

"I am of the opinion, that the Charter Section involved is susceptible of such arbitrary application as to amount, if such be the course pursued, in view of presumptions generally indulged and of the development of decisions, seeking carefully to preserve, and not greatly to hamper the exercise of municipal sovereignty for the common good, to a burden upon private property almost, if not quite, to the point of confiscation."

The chancellor further says :

"But the assessed valuation of the property in the benefit district for general tax purposes aggregates no more than the cost of this grading. This would never do, because such an assessment would be obvious confiscation, not of a single isolated lot, but of the entire benefit district. Therefore, an arbitrary assessment was made presumably with the assistance of the same assessor who makes the assessments for general tax purposes, amounting, as we have seen, to nearly five times the normal assessed valuation. \* \* \* This property, for this improvement, is charged with considerably more than its entire assessed valuation for general

tax purposes. It sufficiently appears that these tax bills amount to more than one-third of the actual value, and that the benefit to complainants' property, if any, is negligible."

The chancellor further says in said opinion:

"Tract No. 14, belonging to Carrie S. Abernathy was assessed, for general tax purposes, in the year 1915, at \$6400.00; for 1916 at \$6400.00; for 1917, at \$6400.00. In 1916 for Meyer Boulevard at \$24,920. The tax bill against this property for this grading was \$6424.00. Tract No. 15, belonging to Carrie S. Abernathy, was assessed, for general tax purposes in the year 1915, at \$6000.00; for 1916, at \$6000.00; for 1917 at \$6000.00. In 1916 for Meyer Boulevard at \$24,570.00. The tax bill against this property for this grading was \$6333.80. \* \* \* It further appears that the tax bills issued against these tracts for this improvement aggregate \$46,061.00; nearly \$6000.00 more than the assessed valuation for general tax purposes in 1916, and nearly \$8000.00 more than they were assessed for the same purposes in 1917."

From the final decree of said District Court, the defendants McMillan Contracting Company and Fidelity National Bank and Trust Company have attempted to appeal to the Circuit Court of Appeals for the Eight District.

Section 238 of the Judicial Code, 38 Statutes at Large, page 804 (Section 1215 of the Compiled Statutes 1918) fixing the appellate jurisdiction of this Honorable Court is as follows:

"Appeals and writs of error may be taken from the District Courts, including the United

States District Court for Hawaii and the United States District Court of Porto Rico, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States." (March 3, 1891 c. 517, Sec. 5, 26 Stat. 827; Jan. 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, Sec. 35, 31 Stat. 85; April 30, 1900, c. 339, Sec. 86, 31 Stat. 158; March 3, 1909, c. 269, Sec. 1, 35 Stat. 838; March 3, 1911, c. 231, Secs. 238, 244, 36 Stat. 1157; Jan. 28 1915, c. 22, Sec. 2, 38 Stat. 804.)

The appellate jurisdiction of the Circuit Court of Appeals is fixed by Section 128 of the Judicial Code, 38 Statutes at Large, page 803 (Section 1120, Compiled Statutes 1918) which is as follows:

"The Circuit Courts of Appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts, including the United States District Court for Hawaii and the United States District Court for Porto Rico, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty,

the judgments and decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the trade-mark laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases." March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; March 3, 1911, c. 231, Sec. 128, 36 Stat. 1133; Jan. 28, 1915, c. 22, Sec. 2, 38 Stat. 803).

39 Statutes at Large, page 727, Sec. 6 (Section 1228-A, Compiled Statutes 1918), provides that no appeal intending to bring up any cause for review by this Honorable Court shall be allowed or entertained unless duly applied for within three months after the entry of the judgment or decree complained of, while 26 Statutes at Large, page 829, Sec. 11 (Sec. 1647, Compiled Statutes 1918), provides for appeal to the Circuit Court of Appeals within six months.

This case comes clearly and directly under the provisions of Section 238 of the Judicial Code above quoted, and a direct appeal to this Honorable Court is the only method of review, because the sole issue in the case upon which the jurisdiction of the United States District Court rested was whether or not the laws of the State of Missouri relating to the assessment and levy of the special tax in controversy were or were not in contravention of the Constitution of the United States. No appeal having been taken to this Honorable Court within the time prescribed, and no appeal having been at-

tempted to any court within the time prescribed for appeals to this Honorable Court, the judgment and decree of the District Court became final. The decisions are numerous and uniform to the effect that under these circumstances, neither this Honorable Court nor the Court of Appeals could acquire appellate jurisdiction.

Thus in *Lemke, Attorney General of North Dakota, et al. v. Farmers Grain Company of Embden, N. D.*, 42 Sup. Ct. Rep. 244 (Case No. 456, decided February 27, 1922), this Honorable Court says on page 245:

"At the threshold we are met with a question of the jurisdiction of the Circuit Court of Appeals to review the decree of the District Court. It is well settled that when the jurisdiction of the District Court rests solely upon an attack upon a state statute because of its alleged violation of the Federal Constitution, a direct appeal to this court is the only method of review. Section 238, Judicial Code (Comp. St. Sec. 1215). *Carolina Glass Co. v. South Carolina*, 240 U. S. 305, 36 Sup. Ct. 293, 60 L. Ed. 658, and cases cited."

In *Raton Water Works Company v. City of Raton*, 249 U. S. 552, the memorandum opinion by the Chief Justice is not lengthy and is as follows:

"The certificate states that in a cause pending before it on appeal from the District Court, the jurisdiction of the court below to entertain the cause on appeal as questioned on the ground that the judgment of the District Court was exclusively susceptible of being reviewed by direct appeal to this court. The certificate further states that the parties to the cause in the District Court were both corporations of New Mexico and the jurisdiction of

the District Court to entertain the suit was based solely upon the ground that it was one arising under the Constitution of the United States.

Resulting from these conditions the question which the certificate propounds is this: 'Has the court (the Circuit Court of Appeals) jurisdiction of the appeal?' The solution of the question is free from difficulty, since whatever at one time may have been the basis for hesitancy concerning the question the necessity for a negative answer is now conclusively manifest as the result of a line of decisions determining that, under the circumstances as stated, the Circuit Court of Appeals was without jurisdiction of the appeal, as the exclusive power to review was vested in this court. Judicial Code, Secs. 128, 238; *American Sugar Refining Co. v. New Orleans*, 181 U. S. 277-281; *Huguley Manufacturing Co. v. Galetton Cotton Mills*, 184 U. S. 290, 295; *Union & Planters Bank v. Memphis*, 189 U. S. 71, 73; *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 458; *Carolina Glass Co. v. South Carolina*, 240 U. S. 305, 318.

A negative answer to the question propounded is therefore directed. And it is so ordered."

So also in *Carolina Glass Company v. South Carolina*, 240 U. S. 1. c. 318, this Honorable Court says:

"This writ brings up a judgment rendered by the Circuit Court of Appeals, Fourth Circuit, affirming the same final judgment of the District Court considered in No. 205, *supra*. 206 Fed. Rep. 635. There is no allegation of diverse citizenship and the trial court's jurisdiction was invoked solely upon the ground that the controversy involved application of the Federal Constitution.

In such circumstances the Circuit Court of Appeals is without jurisdiction to review. *Union & Planters' Bank v. Memphis*, 189 U. S. 71, 73.

Its judgment is accordingly reversed and the cause remanded with directions to dismiss the writ of error improperly entertained."

*Union and Planters' Bank v. Memphis*, 189 U. S. 71, this Honorable Court through Mr. Chief Justice Fuller says on page 73:

"Diversity of citizenship did not exist, and the jurisdiction of the Circuit Court rested solely on the ground that the cause of action arose under the Constitution of the United States. The appeal lay directly to this court under section five of the Judiciary Act of March 3, 1891, and not to the Circuit Court of Appeals. *American Sugar Refining Company v. New Orleans*, 181 U. S. 277."

To the same effect is *American Sugar Refining Company v. New Orleans*, 181 U. S. 277.

Upon this point the Court of Appeals in the case at bar said:

"The jurisdiction of the court in the first two cases (which included this case) to entertain the case depended upon the assertion of the conflict of the local statutes with the Constitution of the United States, as there was no allegation of diversity of citizenship nor allegation of any other ground of jurisdiction. The decree was in favor of the complainants. It is settled that where the jurisdiction of the court depends only upon the ground that the cause of action arises under the Constitution of the United States, the Circuit Court of Appeals has no jurisdiction to review the case, as an appeal in such a case must be sought in the Supreme Court of the United States under Sections 128 and 238 of the Judicial Code" (Cases cited).



It will be borne in mind that no question of diversity of citizenship is involved, all of the parties to the suit being citizens and residents of Kansas City, Jackson County, Missouri, and the sole question involved is whether or not the acts complained of were in violation of the Federal Constitution.

We, therefore, submit that no appellate jurisdiction was acquired, and that the decree of the District Court is final.

## II.

It is apparently claimed by the appellants that even though the Circuit Court of Appeals acquired no jurisdiction, that this Honorable Court can acquire jurisdiction by virtue of the act of Congress approved September 14th, 1922, adding Section 238a to the Judicial Code which reads as follows:

"If an appeal or writ of error has been or shall be taken to, or issued out of, any Circuit Court of Appeals in a case wherein such appeal or writ of error should have been taken to or issued out of the Supreme Court, or if an appeal or writ of error has been or shall be taken to, or issued out of, the Supreme Court in a case wherein such appeal or writ of error should have been taken to, or issued out of, a Circuit Court of Appeals, such appeal or writ of error shall not for such reason be dismissed, but shall be transferred to the proper court, which shall thereupon be possessed of the same and shall proceed to the determination thereof, with the same force and effect as if such appeal or writ of error had been duly taken to, or issued out of, the court to which it is so transferred."

In order to determine what effect, if any, this legislative enactment has upon the case at bar, it should be borne in mind that the final judgment and decree of the United States District Court was made and entered of record on July 7, 1921, that no petition for a rehearing was filed and that no effort or attempt was made by the appellants to appeal said cause until January 4, 1922, after the expiration of three months, but within the period of six months after the rendition of said judgment, when an attempt was made to appeal to the Circuit Court of Appeals. We submit that after the expiration of three months from the rendition of judgment, during which time no appeal had been taken to this Honorable Court, the judgment of the District Court became final and binding, and the rights thereunder became vested and absolute, and could not be affected or changed by any subsequent legislation.

The Act of Congress approved September 14th, 1922, cannot be construed to apply to judgments which have become final without violating the due process clause of the Fourteenth Amendment of the Constitution of the United States. Such an attempt would be a legislative infringement upon the judicial department of our Government.

This question has been squarely met and decided by this Honorable Court in the case of the *State of Pennsylvania v. Wheeling & Belmont Bridge Company, et al.* 15 Law Ed. 435. This case involves the question of whether or not a certain bridge across the Ohio River was an unlawful obstruction. The court had thereto-

fore decreed that the obstruction was unlawful and ordered its removal. After the rendition of such decree, Congress passed a law which provided that the bridges across the Ohio River at Wheeling in the State of Virginia and at Bridgeport in the State of Ohio, abutting Zane's Island are hereby declared to be lawful structures in their present positions and elevations, and shall be so held and taken to be, anything in the law or laws of the United States to the contrary notwithstanding. This Honorable Court says on page 437:

"But it is urged that the Act of Congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially, as it respects adjudication upon the private rights of the parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it.

"The case before us, however, is distinguishable from this class of cases, so far as it respects that portion of the decree directing the abatement of the bridge. Its interference with the free navigation of the river constituted an obstruction of a public right secured by Acts of Congress.

But, although this right of navigation be a public right common to all, yet a private party sustaining special damage by the obstruction may, as has been held in this case, maintain an action at law against the party creating it, to recover his damages; or to prevent irreparable injury, file a bill in chancery for the purpose of removing the obstruction. In both cases, the private right to damages, or to the removal, arises out of the unlawful interference with the enjoyment of the pub-

lic right, which, as we have seen, is under the regulation of Congress. Now, we agree, if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of Congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the court. The decree before us, so far as it respects the costs adjudged, stands upon the same principles, and is unaffected by the subsequent law."

This question has been decided by the Federal District Court in the case of *United States v. Aaker-vik*, 180 Fed. 137, where the authorities are collected and discussed at length. In that case the respondent after coming to this country from Norway, received his naturalization papers through the judgment of the Federal Court having jurisdiction upon March 10, 1902. Thereafter by act of June 29th, 1906, Congress authorized the bringing of a suit upon the part of the United States District Attorney for the purpose of setting aside and cancelling such certificate of citizenship on the grounds of fraud, or because illegally procured, and suit was instituted in pursuance of said statute attacking the validity of the naturalization decree. The court said in part (page 147):

"Prior to the recent Act of Congress, the respondent's status as a naturalized citizen of the United States had, under the practice and rulings of the courts, become unalterably fixed and settled. The time had wholly elapsed in which the government could have applied in the same case for

a rehearing or a new trial, and there was left no remedy by appeal so that the order admitting him to citizenship could be reviewed in that way. According to the adjudged cases, there was no equitable remedy left, the order being tantamount to a judgment, by which it might be vacated or annulled for fraud practiced upon the court by perjury or false swearing in procuring the order, nor for a revision of the court's action for error in passing upon the effect of the evidence. So that, but for the act in question, the government was wholly without a remedy for questioning the validity of respondent's citizenship. His status had become finally and effectually settled. It is only by prescribing a new and additional remedy that the government is enabled at all to attack this status, and this after the status had become judicially established. It seems clear that the effect of the legislation is to grant a new trial in a judicial proceeding which had otherwise become final and effective. That the result is destructive of a settled and most important and valuable right and privilege cannot be gainsaid. \* \* \* I hold, therefore, that the present suit does not lie to correct that error, and it will be dismissed."

The court in that case quotes with approval Black on Judgments, Section 298, page 146, as follows:

"The power to open or vacate judgments is essentially judicial. Therefore, on the great constitutional principle of the separation of the powers and functions of the three departments of government, it cannot be exercised by the Legislature. While a statute may indeed declare what judgment shall in future be subject to be vacated, or when or how or for what causes, it cannot apply retrospectively to judgment already rendered and which had become final and unalterable by the

court before its passage. Such an act would be unconstitutional and void on two grounds: First, because it would unlawfully impair the fixed and vested rights of the successful litigant; and, second, because it would be an unwarranted invasion of the province of the judicial department.'

Mr. Cooley is as explicit. He says:

'It is always competent to change an existing law by a declaratory statute; and where the statute is only to operate upon future cases, it is no objection to its validity that it assumes the law to have been in the past what it is now declared that it shall be in the future. But the legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power but it would be its exercise in the most objectionable and offensive form, since the Legislature would in effect sit as a court of review to which parties might appeal when dissatisfied with the rulings of the courts. Cooley's Constitutional Limitations (6th Ed.) p. 111.' "

The Aakervik case is relied upon and quoted at length by the Circuit Court of Appeals for the Ninth District in *Miocene Ditch Company v. Champion Mining & Trading Co.*, 197 Fed. 497.

*Plahn v. Givernaud*, 85 N. J. Eq. 143 (decided Nov. 15, 1915), 1 c. 145-146.

"The decree having established a property right, and that right having become vested by the expiration of the time within which an appeal might have been taken, it could not thereafter be impaired by legislative enactment. This is the doctrine declared by the Court of Appeals of New York in *Germania Savings Bank v. Suspension*

*Bridge*, 159 N. Y. 362, and by the Supreme Court of Maine in *Atkinson v. Dunlap*, 50 Me. 11. It is fully supported by the reasoning of Chief Justice Beasley in the opinion delivered by him in our Supreme Court in *Ryder v. Wilson's Executors*, 41 N. J. Law, 10, and by that of Mr. Justice Dixon, speaking for this court, in the case of *Moore v. State*, 34 N. J. Law, 203, and meets with our entire approval. We are not to be understood as denying the power of the legislature to extend the time to appeal before that right has expired by limitation. What we do determine is that a statute like that which we have been discussing is unconstitutional, so far as it operates to revive a right of appeal after it has expired under the then existing law, and property rights have thereby become vested."

*Atkinson v. Dunlap*, 50 Me. 111:

(Syllabus): "A judgment of court becomes final when, by the then existing laws, the time for a review and for reversal for error, has expired; it then becomes a vested right, by force of the Constitution and existing laws. And a statute, designed to retroact on such a case, by reviving the right of review, is unconstitutional and void."

In the opinion:

"That the legislature has constitutional jurisdiction over remedies is a proposition not to be controverted; but, after all existing remedies have been exhausted and rights have become permanently vested, all further interference is prohibited."

6 Ruling Cas Law, p. 310, Subject: Constitutional Law, Sec. 297.

*Burch v. Newbury*, 10 N. Y. 374.

*Carleton & Slade v. Goodwin*, 41 Ala. 153.

*Johnson v. Gebbauer*, 159 Ind. 271.



- Blair v. Miller*, 4 Dallas 21.  
*Dyer v. City of Belfast*, 88 Me. 140.  
*Marpole v. Cather*, 78 Va. 239.  
*Ford v. Lenander*, 145 Ia. 106.  
*Weiland v. Shillock*, 24 Minn. 348.  
*Germania Savings Bank v. Suspension Bridge*,  
 159 N. Y., loc. cit., 368.  
*Sydnor, et al. v. Palmer*, 32 Wis. 408.  
*Town of Lancaster v. Barr*, 25 Wis. 562.  
*Blakeley & Copeland v. Frazier*, 15 S. Car.  
 615.  
*Weaver v. Lapsley*, 43 Ala. 226.  
*McCabe v. Emerson*, 18 Pa. St. 112.  
*Greenwood v. Butler*, 52 Kans. 428.  
*Gilman v. Tucker*, 128 N. Y. 204.  
*State of Pa. v. Bridge Co.*, 18 Howard 431.  
*Cassard v. Tracy*, 52 La. Ann. 848 (l. c.).  
*Cooley on Constitutional Limitations*, 7th Ed.,  
 p. 138 (and notes), p. 521 (and note).  
*Ratcliffe v. Anderson*, 31 Gratton (Va.) 105.  
*Old Nick Williams Co. v. United States*, 215  
 U. S. 543.  
*Hill v. Town of Sunderland*, 3 Vt. 509.

The judgment of the District Court was rendered as above stated on July 7th, 1921. No petition for a rehearing was filed and no action was taken by the defendants therein, or either of them, questioning the finality of the judgment within the period of three months after its rendition and entry, so that said judgment and final decree of the District Court became final and binding on all of the parties to said suit on October 7th, 1921, and the rights adjudicated by said decree on said named date became vested rights. No action whatever was taken by the defendants thereon until January 4th, 1922, and just three days before the expiration of six months

from the rendition of the judgment. At that time an attempt was made to appeal to the Circuit Court of Appeals, as hereinabove discussed. These enormous special tax bills were levied against the property of appellees shortly after the passage of and in pursuance of the ordinance of Kansas City which became effective January 26th, 1915, providing for the work to be done, for which the special tax bills were issued, and the attempted contract for the work was let on behalf of the City on October 26, 1915, and said tax bills were issued November 23, 1916. The tax bills involved in this suit exceeded the total assessed valuation of the property, and the benefit to appellees from the work for which the tax bills were issued was negligible, if not entirely absent, as found by the chancellor before whom the case was tried.

It necessarily follows that a cloud thus cast upon the title to the property and remaining for approximately eight years almost, if not entirely, prevents alienation of the land and works a great hardship upon the respective owners.

If the statutory enactment of September 14th, 1922, as Section 238-A of the Judicial Code can affect a judgment which became final and binding on October 7, 1921, or a little more than eleven months before the passage of the act, then by parity of reasoning, it would affect and might overturn judgments which became final five years, ten years or twenty years before the passage of the act. If this were the law, then an Act of Congress could overthrow and destroy rights which became estab-

lished and vested by judicial decree at any period from the beginning of our Government.

We, therefore, submit that both this Honorable Court and the Circuit Court of Appeals are entirely without appellate jurisdiction, that the decree of the District Court is final and absolute, and that the motion to dismiss the appeals should be sustained.

Respectfully submitted,

O. H. DEAN,  
H. M. LANGWORTHY,  
ROY B. THOMSON,  
MELVILLE W. BORDERS,  
*Attorneys for Appellees.*

*In the United States Circuit Court of Appeals. Eighth Circuit. McMillan Contracting Company, and Fidelity National Bank and Trust Company of Kansas City, Appellants, vs. Walter L. Abernathy and Carrie S. Abernathy, Appellees. No. ....*

**Appellees' Motion to Dismiss Appeals and  
Memorandum in Support Thereof.**

**Appellees' Motion to Dismiss Appeals.**

Come now Walter L. Abernathy and Carrie S. Abernathy, appellees (complainants below), and appear specially for the purposes of this motion and without an intention to appear generally, and without intending to waive the question of the jurisdiction of this Honorable Court, and move the court to dismiss the appeal of McMillan Contracting Company and Fidelity National Bank and Trust Company (defendants below) for the following reasons, to-wit:

1. This is a suit in equity instituted in the District Court of the United States for the Western Division of the Western District of Missouri, for the purpose of having certain alleged special taxes upon the land of the complainants in Kansas City, Missouri, purporting to have been levied under the laws of the State of Missouri, adjudicated and declared illegal and void, because such alleged taxes, if enforced, would deprive the complainants of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, a copy of which first amended bill of complaint, under which said suit was tried, is included in the transcript of said causes heretofore filed in this court, to which reference is hereby made.

2. That the jurisdiction of the United States District Court in said cause rested solely upon an attack upon a state statute and provisions of the Charter of Kansas City, Missouri, because of their alleged violation of the Federal Constitution.

3. That on July 7th, 1921, said District Court of the United States rendered final judgment and decree in favor of said complainants, adjudging said alleged special taxes upon the property of the complainants to be null and void, because contrary to and in violation of the provisions of the Federal Constitution.

4. That thereafter and on January 4, 1922, defendant, McMillan Contracting Company and Fidelity National Bank and Trust Company, filed a petition for an appeal from said final judgment in said District Court to this Honorable Court, and said District Court made an order allowing said appeals.

5. That by virtue of the facts as herein stated, this Honorable Court did not and could not acquire jurisdiction over said cause by virtue of said attempted appeals.

Wherefore, said appellees pray this Honorable Court to make an order dismissing said appeals.

O. H. DEAN,  
H. M. LANGWORTHY,  
ROY B. THOMSON,  
MELVILLE W. BORDERS,  
*Attorneys for Appellees.*

*In the United States Circuit Court of Appeals. Eighth Circuit. McMillan Contracting Company, and Fidelity National Bank and Trust Company of Kansas City, Appellants, vs. Walter L. Abernathy and Carrie S. Abernathy, Appellees. No. ....*

**Memorandum in Support of Motion to Dismiss the Appeals.**

The jurisdiction of the United States District Court in this cause rested solely upon the alleged violation of the Federal Constitution in the levying of special taxes under the laws of the State of Missouri, upon the property of the appellees (complainants below) in Kansas City, the amended bill of complaint under which the case was tried containing the following allegations with respect to the jurisdiction of the United States District Court, to-wit:

"Now come complainants, Walter L. Abernathy, and Carrie S. Abernathy, and for their cause of action against defendants, and each of them, allege as follows, to-wit:

1. That at and before the filing of the original bill of complaint, complainants were and now are, husband and wife, and resident and citizens of Jackson County, Missouri, and defendants, and each of them, were and now are corporations duly organized under and by virtue of the laws of the State of Missouri, and residents and citizens of the State of Missouri, and of the Western District thereof, with their principal offices at Kansas City, Jackson County, Missouri.

2. That this court has jurisdiction of said cause, for the reason that said action is of a civil nature in

equity; that the matter and amount in controversy, exceeds, exclusive of interest and costs, the sum or value of three thousand (\$3000) dollars, as hereinafter more fully set forth; that said controversy arises under the Constitution of the United States, and particularly the Fourteenth Amendment thereof, as hereinafter more fully set forth."

The District Court adjudged said special taxes invalid, unconstitutional and void, and from this final judgment, the defendants, McMillan Contracting Company and Fidelity National Bank and Trust Company, has attempted to appeal to this Honorable Court.

Section 238 of the Judicial Code (Section 1215 Compiled Statutes 1918), fixing the appellate jurisdiction of the United States Supreme Court is as follows:

"Appeals and writs of error may be taken from the District Courts, including the United States District Court for Hawaii and the United States District Court for Porto Rico, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a state is claimed to be in contravention



of the Constitution of the United States (March 3, 1891, c. 517, Sec. 5, 26 Stat. 827; Jan. 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, Sec. 35, 31 Stat. 85; April 30, 1900, c. 339, Sec. 86, 31 Stat. 158; March 3, 1909, c. 269, Sec. 1, 35 Stat. 838; March 3, 1911, c. 231, Secs. 238, 244, 36 Stat. 1157; Jan. 28, 1915, c. 22, Sec. 2, 38 Stat. 804.).

The appellate jurisdiction of this Honorable Court is fixed by Section 128 of the Judicial Code (Section 1120 Compiled Statutes 1918) which is as follows:

"The Circuit Courts of Appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts, including the United States District Court for Hawaii and the United States District Court for Porto Rico, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the trade-mark laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases (March 3, 1891, c. 517, Sec. 6 26 Stat. 828; March 3, 1911, c.

231, Sec. 128, 36 Stat. 1133; Jan. 28, 1915, c. 22, Sec. 2, 38 Stat. 803)."

Section 1228a, Compiled Statutes 1918, provides that no appeal intending to bring up any cause for review by the Supreme Court shall be allowed or entertained unless duly applied for within three months after the entry of the judgment or decree complained of, while Section 1647, provides for appeals to this Honorable Court within six months.

This case comes clearly and directly under the provisions of Section 238 of the Judicial Code above quoted, and a direct appeal to the United States Supreme Court is the only method of review, because the sole issue in the case upon which the jurisdiction of the United States District Court rested was whether or not the laws of the State of Missouri, relating to the assessment and levy of the special tax in controversy were or were not in contravention of the Constitution of the United States. The decisions are numerous and uniform to the effect that under these circumstances this court cannot acquire appellate jurisdiction.

Thus in *Lemke, Attorney General of North Dakota, et al. v. Farmers Grain Company of Embden, N. D.*, 42 Sup. Ct. Rep. 244 (Case No. 456, decided Feb. 27, 1922), the United States Supreme Court says on page 245:

"At the threshold we are met with a question of the jurisdiction of the Circuit Court of Appeals to review the decree of the District Court. It is well settled that when the jurisdiction of the District Court rests solely

upon an attack upon a state statute because of its alleged violation of the Federal Constitution, a direct appeal to this court is the only method of review. Section 238, Judicial Code (Comp. St. Sec. 1215). *Carolina Glass Co. v. South Carolina*, 240 U. S. 305, 36 Sup. Ct. 293, 60 L. Ed. 658, and cases cited."

In *Raton Water Works Company v. City of Raton*, 249 U. S., 552, the memorandum opinion by the Chief Justice is not lengthy and is as follows:

"The certificate states that in a cause pending before it on appeal from the District Court, the jurisdiction of the court below to entertain the cause on appeal was questioned on the ground that the judgment of the District Court was exclusively susceptible of being reviewed by direct appeal to this court.<sup>1</sup> The certificate further states that the parties to the cause in the District Court were both corporations of New Mexico and the jurisdiction of the District Court to entertain the suit was based solely upon the ground that it was one arising under the Constitution of the United States.

Resulting from these conditions the question which the certificate propounds is this: 'Has the court (the Circuit Court of Appeals) jurisdiction of the appeal?' The solution of the question is free from difficulty, since whatever at one time may have been the basis for hesitancy concerning the question the necessity for a negative answer is now conclusively manifest as the result of a line of decisions determining that, under the circumstances as stated, the Circuit Court of Appeals was without jurisdiction of the appeal, as the exclusive

power to review was vested in this court. Judicial Code, Secs. 128, 238; *American Sugar Refining Co. v. New Orleans*, 181 U. S. 277-281; *Huguley Manufacturing Co. v. Galetton Cotton Mills*, 184 U. S. 290, 295; *Union & Planters Bank v. Memphis*, 189 U. S. 71, 73; *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 458; *Carolina Glass Co. v. South Carolina*, 240 U. S. 305, 318.

A negative answer to the question propounded is therefore directed. And it is so ordered."

So also in *Carolina Glass Company v. South Carolina*, 240 U. S. l. c. 318, the Supreme Court says:

"This writ brings up a judgment rendered by the Circuit Court of Appeals, Fourth Circuit, affirming the same final judgment of the District Court considered in No. 205, *supra*, 206 Fed. Rep. 635. There is no allegation of diverse citizenship and the trial court's jurisdiction was invoked solely upon the ground that the controversy involved application of the Federal Constitution.

In such circumstances the Circuit Court of Appeals is without jurisdiction to review. *Union & Planters' Bank v. Memphis*, 189 U. S. 71, 73. Its judgment is accordingly reversed and the cause remanded with directions to dismiss the writ of error improperly entertained."

*Union and Planters' Bank v. Memphis*, 189 U. S. 71, the Supreme Court through Mr. Chief Justice Fuller says on page 73:

"Diversity of citizenship did not exist, and the jurisdiction of the Circuit Court rested solely on the ground that the cause of action arose under the Constitution of the United States. The appeal lay directly to this court under section five of the Judiciary Act of March 3, 1891, and not to the Circuit Court of Appeals. *American Sugar Refining Company v. New Orleans*, 181 U. S. 277."

To the same effect is *American Sugar Refining Company v. New Orleans*, 181 U. S. 277.

It will be borne in mind that no question of diversity of citizenship is involved, all of the parties to the suit being citizens and residents of Kansas City, Jackson County, Missouri, and the sole question involved is whether or not the taxes assessed and levied were in violation of the Federal Constitution.

We, therefore, submit that this Honorable Court is without jurisdiction and that the motion to dismiss should be sustained.

O. H. DEAN,  
H. M. LANGWORTHY,  
ROY B. THOMSON,  
MELVILLE W. BORDERS,  
*Attorneys for Appellees.*

*In the United States Circuit Court of Appeals. Eighth Circuit. McMillan Contracting Company, a Corporation, et al., Appellants, v. Walter L. Abernathy, et al., Appellees. No. 6134.*

### **Supplemental Authorities on Behalf of Appellees.**

#### **I.**

The judgments in these cases became final on October 7, 1921, and the rights of appellees became *vested rights*. The Act of Congress approved September 14, 1922, cannot be construed to apply to judgments which have become final without violating the due process clause of the Fourteenth Amendment to the Federal Constitution.

*Plahn v. Givernaud*, 85 N. J. Eq. 143 (decided Nov. 15, 1915), l. c. 145-146.

"The decree having established a property right, and that right having become vested by the expiration of the time within which an appeal might have been taken, it could not thereafter be impaired by legislative enactment. This is the doctrine declared by the Court of Appeals of New York in *Germania Savings Bank v. Suspension Bridge*, 159 N. Y. 362, and by the Supreme Court of Maine in *Atkinson v. Dunlap*, 50 Me. 11. It is fully supported by the reasoning of Chief Justice Beasley in the opinion delivered by him in our Supreme Court in *Ryder v. Wilson's Executors*, 41 N. J. Law, 10, and by that of Mr. Justice Dixon, speaking for this court, in the case of *Moore v. State*, 34 N. J. Law, 203, and meets with our entire approval. We are not

to be understood as denying the power of the legislature to extend the time to appeal before that right has expired by limitation. What we do determine is that a statute like that which we have been discussing is unconstitutional, so far as it operates to revive a right of appeal after it has expired under the then existing law, and property rights have thereby become vested."

*Atkinson v. Dunlap*, 50 Me. 111.

(Syllabus): "A judgment of court becomes final when by the then existing laws, the time for a review and for reversal for error, has expired; it then becomes a vested right, by force of the Constitution and existing laws. And a statute, designed to retroact on such a case, by reviving the right of review, is unconstitutional and void."

In the opinion:

"That the legislature has constitutional jurisdiction over remedies is a proposition not to be controverted; but, after all existing remedies have been exhausted and rights have become permanently vested, all further interference is prohibited."

6 Ruling Case Law, p. 310, Subject: Constitutional Law, Sec. 297.

*Burch v. Newbury*, 10 N. Y. 374.

*Carleton & Slade v. Goodwin*, 41 Ala. 153.

*Johnson v. Gebhauer*, 159 Ind. 271.

*Blair v. Miller*, 4 Dallas 21.

*Dyer v. Breyfast*, 88 Me. 140.

*Marpole v. Cather*, 78 Va. 239.

*Ford v. Lenander*, 145 Ia. 107.

*Weiland v. Shillock*, 24 Minn. 348.

*Germania Savings Bank v. Suspension Bridge*,  
159 N. Y. lo. cit. 368.



- Sydnor, et al. v. Palmer*, 32 Wis. 408.  
*Town of Lancaster v. Barr*, 25 Wis. 562.  
*Blakeley & Copeland v. Frazier*, 15 S. Car. 615.  
*Weaver v. Lapsley*, 43 Ala. 226.  
*McCabe v. Emerson*, 18 Pa. St. 112.  
*Greenwood v. Butler*, 52 Kans. 428.  
*Gilman v. Tucker*, 128 N. Y. 204.  
*State of Pa. v. Bridge Co.*, 18 Howard 431.  
*Cassard v. Tracy*, 52 La. Ann. 848 (l. c.).  
*Cooley on Constitutional Limitations*, 7th Ed. p. 138 (and notes) p. 521 (and note).  
*Ratcliffe v. Anderson*, 31 Gratton (Va.) 105.  
*Old Nick Williams Co. v. United States*, 215 U. S. 543.  
*Hill v. Town of Sunderland*, 3 Vermont 509.

## II.

The contention of counsel for appellants that if there be other questions involved besides the constitutional question, the appeal may be taken to either the Court of Appeals or to the Supreme Court is certainly not well taken, unless the "other questions" are Federal questions.

*Farmers Grain Co. v. Langer*, 273 Fed. 635, 637 (C. C. A. 8th. Cir.).

In this case the Court discusses very fully this matter, and, on the strength of the Spreckles case, 192 U. S. 397; the Raton Water Works Co. case, 249 U. S. 552; *Vicksburg v. Vicksburg Water Works Co.*, 202 U. S. 453; and the Walla Walla case, 172 U. S. 1, concludes that the "other questions" must be such as are grounds of Federal jurisdiction, and "that it is not true

that merely because a case involves other questions than a constitutional question, that the case may be brought to this court on appeal or writ of error."

### III.

The contention of counsel for appellants to the effect that these cases could not be appealed to the United States Supreme Court because no constitutional question was properly raised, is without merit.

The other question raised by complainants' bills, such as that the procedure necessary to the issuance of valid tax bills was irregular or defective, were not inconsistent with and were wholly independent of the claim that the charter and the ordinance in question, of Kansas City, violated the Federal Constitution.

The complainants' contentions that the city authorities did not proceed in due conformity with the city charter and ordinance is not at all inconsistent with the claim that the city charter and ordinance violated the Federal Constitution. Both claims may be true. However, the claim that the charter and ordinance did violate the Federal Constitution is sufficient to give the Federal Court jurisdiction and to fix the appellate jurisdiction in the Supreme Court.

*Siler v. L. & N. R. R. Co.*, 213 U. S. 173, 192.

In the *Siler* case the Railroad Company attacked a rate order of the Kentucky Railroad Commission, on the ground that the Kentucky law did not give the power

to the Commission to make the order in question, asserting that:

"No power or authority had been vested in or conferred upon the appellants by the Act of March 10, 1900, or by any law, to make or fix the rates complained of."

The Railroad Company also set up the claim that the said order of the commission, fixing rates, was violative of the Federal Constitution. It was contended in that case that inasmuch as the Railroad Company had alleged in its bill that the rates complained of had been established without State authority, no constitutional question was properly raised. This contention was, however, denied by the United States Supreme Court, and it was held that both the trial court and the Supreme Court had jurisdiction by virtue of the protection asserted under the Federal Constitution.

Respectfully submitted,

O. H. DEAN,  
H. M. LANGWORTHY,  
ROY B. THOMSON,  
MELVILLE W. BORDERS,  
*Attorneys for Appellees.*

**Decision of the United States Circuit  
Court of Appeals.**

*United States Circuit Court of Appeals—Eighth Circuit.*

No. 6134—September Term, A. D. 1922.

*McMillan Contracting Co. et al., Appellants,*

vs.

*Walter L. Abernathy et al., Appellees.*

Appeal from the District Court of the United States  
for the Western District of Missouri.

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No. 6135—September Term, A. D. 1922.

*McMillan Contracting Co. et al., Appellants,*

vs.

*B. Haywood Hagerman, Appellee.*

Appeal from the District Court of the United States  
for the Western District of Missouri.

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No. 6136—September Term, A. D. 1922.

*Fidelity National Bank and Trust Co. et al., Appellants,*

vs.

*Felix H. Swope et al., Appellees.*

Appeal from the District Court of the United States  
for the Western District of Missouri.

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**Motions To Dismiss the Appeals.**

Mr. H. M. Langworthy (Mr. O. H. Dean, Mr. Roy B. Thomson and Mr. Melville W. Borders were with him on the brief), for appellees in No. 6134.

Mr. A. S. Marley and Mr. W. L. Reed filed brief for appellees in No. 6135.

Mr. E. H. Jones (Messrs. Scarritt, Jones, Seddon & North and Mr. Edward L. Scarritt were with him on the brief), for appellees in No. 6136.

Mr. Justin D. Bowersock (Mr. Robert B. Fizzell, Mr. Arthur Miller, Mr. Maurice H. Winger, Mr. Clarence S. Palmer, Mr. Frank P. Barker and Mr. G. V. Head, were with him on the brief), for appellants.

*Before Lewis and Kenyon, Circuit Judges, and Munger, District Judge. Per Curiam:*

Motions to dismiss the appeals in these cases have been made, upon the ground that the appeals could be taken only to the Supreme Court of the United States. The suits sought to have decrees entered declaring certain assessments and levies of special taxes against land in Kansas City, Missouri, to have been illegally imposed, and declaring them to be no lien against the land of the complainants. The asserted grounds for relief were, that a portion of the state statutes of Missouri, known as the Kansas City charter, and the city ordinance enacted to carry into effect this portion of the charter were in violation of the constitution of the United States, and also that this and other provisions of this charter and ordinance were not followed in the proceeding leading to the assessments.

The jurisdiction of the court in the first two cases to entertain the case depended upon the assertion of the conflict of the local statutes with the Constitution of the

United States, as there was no allegation of diversity of citizenship nor allegation of any other ground of jurisdiction. The decree was in favor of the complainants. It is settled that where the jurisdiction of the court depends only upon the ground that the cause of action arises under the Constitution of the United States, the Circuit Court of Appeals has no jurisdiction to review the case, as an appeal in such a case must be sought in the Supreme Court of the United States, under Sections 128 and 238 of the Judicial Code. *American Sugar Refining Co. v. New Orleans*, 181 U. S. 277, 281; *Huguley Mfg. Co. v. Guleton Cotton Mills*, 184 U. S. 290, 295; *Union and Planters' Bank v. Memphis*, 189 U. S. 71, 73; *Vicksburg v. Waterworks Co.*, 202 U. S. 453, 458; *Carolina Glass Co. v. South Carolina*, 240 U. S. 305, 318; *Raton Water Works Co. v. Raton*, 249 U. S. 552, 553; *Lemke v. Farmers' Grain Co.*, . . . . . U. S. . . . ., 42 Sup. Ct. Rep. 244; *Grammer v. Fenton*, 268 Fed. 943, 945.

In the third case now before the court, No. 6136, the jurisdiction of the court was invoked upon the same assertions of a violation of the Constitution of the United States, and also because of diversity of citizenship of the parties. In such a case an appeal lies to the Circuit Court of Appeals. *American Sugar Refining Co. v. New Orleans*, 181 U. S. 277, 281; *Lemke v. Farmers' Grain Co.*, . . . . . U. S. . . . ., 42 Sup. Ct. Rep. 244; *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397, 407. A further ground urged for the dismissal of case No. 6136 is a failure of appellants to have the case

docketed within the period limited as the return day. The record was received by the clerk of this court within that period, but because the docket fee was not then paid, the case was not docketed for several days after the return day. No injury is shown to have occurred to appellees because of this delay and no motion to dismiss the appeal was made before the case was docketed. The delay is therefore no ground for dismissal. *Equitable Life Assur. Co. v. Tolbert*, 145 Fed. 338, 339; *Gould v. United States*, 205 Fed. 883, 885. The motion to dismiss appeal in No. 6136 will be denied.

In the other two cases our attention has been called to the Act of Congress approved September 14, 1922, adding Section 238a to the Judicial Code, which reads as follows:

"If an appeal or writ of error has been or shall be taken to, or issued out of, any Circuit Court of Appeals in a case wherein such appeal or writ of error should have been taken to or issued out of the Supreme Court, or if an appeal or writ of error has been or shall be taken to, or issued out of, the Supreme Court in a case wherein such appeal or writ of error should have been taken to, or issued out of, a Circuit Court of Appeals, such appeal or writ of error shall not for such reason be dismissed, but shall be transferred to the proper court, which shall thereupon be possessed of the same and shall proceed to the determination thereof, with the same force and effect as if such appeal or writ of error had been duly taken to, or issued out of, the court to which it is so transferred."



Appellees claim that no transfer of these cases to the Supreme Court should be ordered under this statute, because the appeals were not applied for within three months after the entry of the decree (Sec. 6, Ch. 448, 39 Stats. 726) and therefore that the Supreme Court would have no jurisdiction to entertain the appeal. This is a question that is more properly determined by the court whose authority is questioned. An order will be entered transferring the appeals in cases numbered 6134 and 6135 to the Supreme Court of the United States.

Filed October 23, 1922.

A true copy.

Attest:

E. E. KOCH,

*Clerk U. S. Circuit Court of Appeals, Eighth Circuit.*

Stamped: United States Circuit Court of Appeals.  
Eighth Circuit.

APR 9 1922

WM. R. STANS

IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1922.

McMILLAN CONTRACTING COMPANY, a  
corporation, and FIDELITY NATIONAL  
BANK AND TRUST COMPANY OF  
KANSAS CITY, a corporation,

*Appellants,*

v.

No. 167

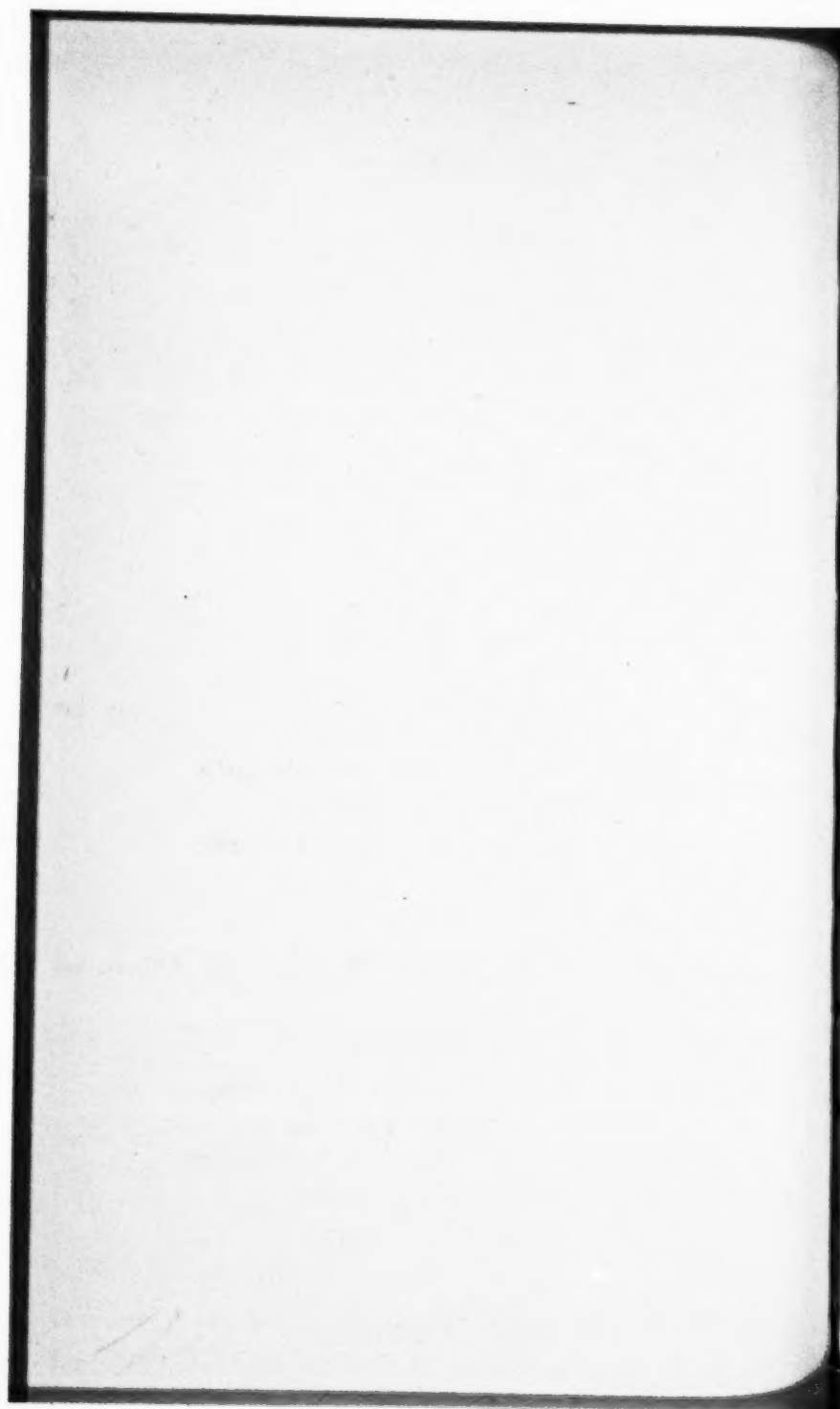
WALTER L. ABERNATHY and CARRIE  
S. ABERNATHY,

*Appellees.*

**Appellants' Brief on Motion to Dismiss**

JUSTIN D. BOWERBROOK,  
ARTHUR MILLER,  
SAM'L J. McCULLOUGH,  
FRANK P. BARKER,  
G. V. HEAD,

*Attorneys for Appellants.*



IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1922.

---

McMILLAN CONTRACTING COMPANY, a  
corporation, and FIDELITY NATIONAL  
BANK AND TRUST COMPANY OF  
KANSAS CITY, a corporation,

*Appellants,*

v.

No. 736.

WALTER L. ABERNATHY and CARRIE  
S. ABERNATHY,

*Appellees.*

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**Appellants' Brief on Motion to Dismiss**

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**STATEMENT.**

This case, originally appealed from the District Court of the United States for the Western Division of the Western District of Missouri to the Circuit Court of Appeals for the 8th Circuit, has, by the latter court, been transferred here, pursuant to the Act of Congress approved September 14, 1922, amending the Judicial Code by adding thereto

Section 238-a. *McMillan Contracting Co. et al. v. Abernathy et al.*, 284 Fed., 354.

This act, providing for the transfer between the Supreme Court and the respective Circuit Courts of Appeals, of appeals taken to the wrong court, was passed by Congress to remedy the situation referred to by Chief Justice Taft in an address before the American Bar Association at San Francisco. This address is published in the Association Journal for October, 1922, the following excerpt being found at pages 603 and 604:

"The statutes defining the jurisdiction of the Supreme Court and Circuit Courts of Appeals are not as clear as they should be. It is necessary to consult a number of them in order to find exactly what the law is, and I regret to say that without clarification by a revision, the law as to the jurisdiction of the Supreme Court and the Circuit Courts of Appeals is more or less a trap in which counsel are sometimes caught."

This case presents an illustration of this "trap" and falls within the express terms of the Act, if, as held by the Circuit Court of Appeals, the appeal to it was erroneous.

Appellants contend that the appeal was properly taken to the Circuit Court of Appeals, and that that court erred in refusing to assume jurisdiction and in transferring the case to this court. Accordingly appellants have filed here in a motion to remand the cause to the Court of Appeals, or to hear and determine the same as upon certificate from said Court of Appeals under Sections 239, 240 and 264 of the Judicial Code. Appellants' contentions respecting

the propriety of the appeal to the latter court are embraced in a memorandum filed with the motion to remand. For the reasons set forth in that memorandum appellants insist that the Act of September 14, 1922, was improperly invoked.

However, if the position taken by the Court of Appeals respecting its jurisdiction of the case be sustained by this court, the Act of Congress of September 14, 1922, applies, and appellees' motion to dismiss should be denied.

Appellees contend that the Act in question, so far as it refers to appeals taken before its passage, is unconstitutional; that the judgment in the lower court became final upon the expiration of three months' period allowed for an appeal to this court; and that rights in, to and under said judgment thereupon became vested and absolute and free from the effects of subsequent legislation. The facts are not controverted: that the judgment in the District Court was rendered July 7, 1921; that the appeal to the Court of Appeals was allowed January 4, 1922, more than three months, but less than six months, thereafter; and that the Act of September 14, 1922, was passed and approved while the case was pending on a motion to dismiss in the Court of Appeals.

Beyond question the Act, as applied to the appeal in this case, is constitutional. If the position taken by the Court of Appeals as to its jurisdiction is correct, the remedy provided by the Act was properly invoked by that court, and under its terms and pursuant to the order of the Court of Appeals this court should hear and determine the cause in the same manner as if directly and duly appealed to this court.

### ARGUMENT.

Section 238-a of the Judicial Code, approved September 14, 1922, applies to the appeal in this case, and confers jurisdiction upon the Supreme Court to proceed to the determination thereof.

The only provision in the Constitution of the United States which might prevent the application of the Act to this appeal is that part of the Fifth Amendment prohibiting the deprivation of life, liberty or property without due process of law. The restriction in Article I, Section 9 of the Constitution, as to the passage of *ex post facto* laws, has no application, since that prohibition relates to criminal and penal laws only.

*Calder v. Bull*, 3 Dall. 386;

*Duncan v. Missouri*, 152 U. S. 377, 14 S. Ct. 570;

*Mallett v. North Carolina*, 181 U. S. 589, 21 S. Ct.

730.

And except to the extent that the impairment of contracts is a violation of the due process clause, there is nothing in the Constitution making an Act of Congress invalid as an impairment of the obligation of contracts. Article 1, Section 10, with respect to such laws, is, by its terms, a restriction on the power of the state, and not of the national government.

Hence the Act is constitutional in its application to this case *unless appellees had a property right in the judg-*



*ment below, of which they were deprived, without due process to law, by the order of the Circuit Court of Appeals transferring the case to this court.*

The motion to dismiss is based on the contention that the Act divests *vested rights* under the judgment. It is to be noted that the words "vested rights" appear nowhere in the Constitution. Rights, vested or otherwise, are protected under the Fifth Amendment only as embraced within the term "property". What *property* had appellees in the judgment below? Of what property in said judgment have appellees been deprived by Section 238a of the Judicial Code? If any, is that deprivation pursuant to due process of law?

#### I.

1. Appellees' whole argument is that the Act of September 14, 1922 cannot constitutionally be made to apply to judgments **then final**. This argument ignores the **circumstance that an appeal was pending in this case at the time of the passage of the Act**. Appellants insist that the pendency of the appeal eliminates all question of the propriety of a retroactive application of the statute. The Act has not been applied retroactively. No final judgment has been affected.

**Even if the Circuit Court of Appeals was without jurisdiction, the case was nevertheless pending in that court on appeal.** The order of the District Court, entered January 4, 1922, granting an appeal to the Court of Appeals, was not void, but on the contrary suspended the operation of

the judgment below, and transferred the case to the appellate court.

This proposition of law, as to the effect of such an appeal, has been declared by the courts on many occasions. The case of *Smith v. Chytraus*, 152 Ill. 664, 38 N. E. 911, is a leading decision on the point. In that case the order of the lower court gave plaintiff certain relief on condition that he pay to defendant, within sixty days from the date of the order, a certain sum of money. An appeal was taken from said order and decree to the State Court of Appeals. Thereafter a motion to dismiss was sustained in said court, on the ground that the appeal should have gone to the State Supreme Court, rather than to the Court of Appeals, and that the latter court was without jurisdiction. The case was then redocketed in the lower court. In the meantime a period of more than sixty days from the date of the decree had expired, and accordingly defendant prayed the lower court for an order of dismissal, in as much as plaintiff had failed, within the sixty day period, to make the payment upon which the relief was conditioned. The court thereupon entered a final order of dismissal. On error to the Supreme Court this order is reversed. The Supreme Court holds that the appeal to the Court of Appeals, although that court was without appellate jurisdiction of the case, nevertheless operated as an appeal, and was valid as such until dismissed, and stayed and suspended the operation of the judgment below, and that the time during which the appeal was pending should be deducted from the sixty days allowed by the original order. The following portion of the opinion deals with that question (p. 669):

"It is urged by defendants in error that the appeal that was allowed and that was taken was an appeal to the appellate court, that the appellate court had no jurisdiction to entertain the appeal, and that, therefore, the appeal was void and of no effect, and that it follows that the restraining of further proceedings implied from an appeal to a court which has no jurisdiction to entertain such appeal must be without any effect also. The premises may be conceded, but we think the conclusions do not follow. In *Reynolds v. Perry*, 11 Ill. 534, Perry brought suit against Reynolds, and recovered judgment for costs only. Reynolds prayed an appeal to this court, and it was granted to him, and he perfected his appeal by filing an appeal bond. At that time the statute only allowed appeals where the judgment, exclusive of costs, amounted to the sum of \$20. or related to a franchise or freehold. It was held that the appeal was improvidently granted, but also held that it restrained Perry from collecting his judgment. It was the right of the defendants to pray for an appeal. It was the province of the court to determine to what court of review or appellate jurisdiction the case was appealable, and to fix the terms on which the appeal might be taken. We said in *Hake v. Strubel*, 121 Ill. 321, 12 N. E. 676: 'The making of the order allowing appeal and fixing the amount of the bond, and the time in which the bond and bill of exceptions in the cause shall be presented and filed, is a judicial act, which can only be performed by the judge in term time, and when sitting as a court. The making of the order is an exercise of the judicial power vested in the presiding judge, but the order when made is the order of the court.' The court, then, when it granted an appeal to the appellate court, was acting judicially, and in respect to a matter that was specially committed to its charge by the statute. It had jurisdiction of the parties and of the subject-matter, and what it did, although it may have been erroneous was not absolutely void and of no effect.

The parties had a right to rely upon it, and were bound by it, until it was set aside by some court lawfully authorized so to do. Sometimes it may be a matter of great doubt to what court a particular suit or proceeding is properly appealable. The trial court, in the first instance, must determine that question, and it determines it judicially, by an exercise of the judicial power that is vested in it. \* \* \*

Our conclusion, then is that the appeal herein to the appellate court, even though granted to a tribunal that had no jurisdiction to entertain it, operated for the time being as an appeal, and became a super-seedeas, and temporarily stayed all proceedings whatever to enforce the execution of the decree."

The case of *Daly v. Kohn*, 230 Ill., 436, 82 N. E., 828 is to the same effect. The court reiterates that an order allowing an appeal to the Court of Appeals transfers the case to that court, even though that court has no jurisdiction of the appeal, and that proceedings below are stayed until the appeal is dismissed.

A similar question arose in *Merrifield v. Western Cottage Piano Co.*, 238 Ill. 526, 87 N. E. 379. Appellee there contended that the proceedings below should not be stayed by the appeal which had been taken, because the appeal was from an interlocutory order, from which no appeal was allowable. The court disposes of this contention thus:

"Appellant contends that said order of February 18th was a final and appealable one, while appellee contends that it was interlocutory and not appealable. However that may be, the appeal was allowed as prayed, and after the filing and approval of the appeal bond that question was transferred to the Appellate Court for its decision.

When an appeal is perfected, the jurisdiction and control of the court below ceases, and the appeal becomes a stay of all proceedings to enforce the execution of the judgment or decree. *Smith v. Chytraus*, 152 Ill. 664, 38 N. E. 911; *Cowan v. Curran*, 216 Ill. 598, 75 N. E. 322; *Bower v. Chicago West Division Railway Co.*, 136 Ill. 101, 26 N. E. 702, 12 L. R. A. 81; *A. R. Barnes & Co., v. Typographical Union*, 232 Ill. 402, 83 N. E. 932, 14 L. R. A. (N. S.) 1150."

The case of *American Button-Hole, Overseaming & Sewing Machine Co. v. Gurnee*, 38 Wis. 533, also establishes that an appeal from an interlocutory order, although such an order is not appealable, is not a nullity, but is operative until dismissed.

It has also been held that the allowance by the court of an appeal to a party who had no right to appeal, transfers the case to the appellate court, and that any action taken by the lower court thereafter, while such appeal is pending, is void and will be set aside.

*Baasen v. Eilers*, 11 Wis. 277.

When the lower court grants an appeal from the judgment or decree, the jurisdiction of that court ceases, and it cannot disregard the appeal and proceed to carry the judgment into effect, nor can it pass upon the legality of the appeal.

*Dunbar v. Dunbar*, 5 W. Va. 567.

In *Pemberton v. Zacharie*, 5 La. Ann. 310, the court treats of the matter thus:

"We consider it clear, that after the inferior court granted the appeal, its cognizance of the case in the issue joined on these exceptions terminated, until that appeal was disposed of. The case could not be pending on this point in the supreme court and the district court at the same time. (page 314).

It has been contended that as this court has decided that the appeal was improperly granted, it could not have had the effect of suspending proceedings in the inferior court. But it is obvious that the effect of an appeal does not depend on the ultimate disposition which may be made of it, but on the fact that it is pending and undecided." (page 315).

There are many decisions to the effect that a judgment from which an appeal is pending cannot be pleaded as an adjudication in bar of a subsequent suit between the same parties involving the same subject matter.

*Edwards v. Bodkin*, 267 Fed. 1004;

*Eastern Bldg. & Loan Assn. v. Welling*, 103 Fed. 352;

*Delk v. Yelton*, 103 Tenn. 476, 53 S. W. 729;

*Day v. De Younge*, 66 Mich. 550, 33 N. W. 527;

*Fassler v. Streit*, 92 Neb. 786, 139 N. W. 628;

*Purser v. Cady*, 120 Cal. 214, 52 Pac. 489.

There can manifestly be no vested property right in a judgment, which is so far suspended that its existence cannot be pleaded or proven in a suit involving the very rights involved in the judgment.

The proposition that an appeal was pending in this case at the time of the passage of the Act of September 14, 1922, is supported by decisions to the effect that the filing of a suit in a court without jurisdiction of the same suspends the running of the statute of limitations. The filing of such a suit is held to be the commencement of an action. There are many such decisions:

- Smith v. McNeal*, 109 U. S. 426;
- McCormick v. Eliot*, 43 Fed. 469;
- Woods v. Houghton*, 1 Gray (Mass.) 580;
- Little Rock, M. R. & T. Ry. Co. v. Manees*, 49 Ark. 248, 4 S. W. 778;
- Pittsburg, C. C. & St. L. Ry. Co. v. Bemis*, 64 Oh. St. 26, 59 N. E. 745;
- Lamb v. Howard*, 102 S. E. 436 (Ga.);
- Wilbourne v. Mann*, 81 So. 816 (Ala.);
- Blume v. New Orleans*, 29 So. 106 (La.);
- Atlanta, K. & N. Ry. Co. v. Wilson*, 47 S. E. 366 (Ga.);

2. It must be clear from the above authorities that the case was pending on appeal in the Circuit Court of Appeals at the time of the passage of Section 238a of the Judicial Code. Such being the fact, there is no constitutional objection to the application of the Act. The statute as applied to this case simply validates an appeal improperly taken, pending at the time of its passage. Such an act does not divest any vested rights. Statutes have been sustained which correct or render immaterial defects in pending appeals vital under the

law in existence at the time of their allowance. Similar statutes have been upheld giving the appellate court jurisdiction of an appeal then pending, although no such jurisdiction existed when the appeal was taken.

In *Hepburn v. Curts*, 7 Watts (Pa.) 300, a statute was sustained and given application to a pending appeal, to the effect that "no action now pending on writ of error or otherwise, by partners or persons against partners or persons, shall abate or be defeated, by reason of one or more individuals being members of both firms."

In *Warton v. Cunningham*, 46 Ala. 590, a statute of 1870, curing a vital defect in the bill of exceptions on file in a case pending on appeal, is held to validate the appeal, although the bill of exceptions was filed and the appeal taken several months before the statute was passed.

The case of *Teel v. Chesapeake & Ohio Ry. Co.*, 204 Fed. 914, 123 C. C. A. 210, holds that where a necessary party defendant is omitted from a writ of error, the Circuit Court of Appeals is authorized by Sections 954 and 1005, Revised Statutes, and by the Court of Appeals Act of March 3, 1891, c. 517, 26 Stat. 829, allowing the unprejudicial amendment of certain defects in writs of error to the district courts, to permit an amendment of a writ of error inserting the name of the omitted party and bringing such party in by a new citation, even though the time for suing out a new writ had expired. The court states the law as follows (page 917):

"Such defects as this are generally curable by amendment of the writ of error and the issue of a new citation. Since the enactment of the first Judiciary Act of the United States, liberal statutory provisions have been maintained for curing defects of this character



wherever proceedings on error or appeal have been instituted in due time, though defectively, and could be remedied without causing injustice; and numerous illustrations may be found of a tendency in the courts to apply such legislation in the spirit in which it was evidently enacted. See Act of September 24, 1789, c. 20, Sec. 32, 1 Stat. 91, Rev. Stat. Sections 954, 1005 (U. S. Comp. St. 1901, pp. 696, 714); *Walton v. Marietta Chair Co.*, 157 U. S. 344, 346, 15 Sup. Ct. 626, 39 L. Ed. 725; *Knickerbocker Life Ins. Co. v. Pendleton*, *supra*; *Estes v. Trabue*, *supra*; *Thomas v. Green County*, 146 Fed. 970, 971, 77 C. C. A. 487 (C. C. A. 6th Cir.) affirmed in 211 U. S. 598, 601, 29 Sup. Ct. 168, 53 L. Ed. 343. In *Gilbert v Hopkins*, 198 Fed. 849, 117 C. C. A. 491 (C. C. A. 4th Cir.), a writ of error seasonably sued out was permitted to be amended by inserting the name of an omitted party, although the time fixed for suing out such a writ had then expired, and the new party was required to be brought in by a new citation.

The time for allowing a new writ of error has likewise expired in the instant case; but in view of the statutory provisions before alluded to, and of section 11 of the Court of Appeals Act (Act March 3, 1891, c. 517, 26 Stat. 829 U. S. Comp. St. 1901, pp. 552), we are disposed to enter a rule on the plaintiff in error to show cause, within ten days after the order is entered, why the Chesapeake & Ohio Railway Company of Kentucky should not be made a party defendant to her proceeding in error and for defendant in error so to show cause why the writ of error should not be permitted to be amended by inserting the name of that company and a new citation to be issued to it."

*Gilbert v. Hopkins*, 198 Fed., 849, 117 C. C. A., 491, referred to in the above excerpt, is to the same effect.

The case of *Freeborn v. Smith*, 2 Wall. 160, is in effect a controlling authority on the present motion. The plaintiff in that case had obtained a judgment against the defendant in

the Supreme Court of Nevada Territory. A writ of error was issued to this judgment from the Supreme Court of the United States and the record of the case was filed in this court. Thereafter, Nevada was admitted to the Union, the enabling act, however, making no provision for the disposal of cases then pending in this court on error or appeal from the territorial courts. This court had previously held, in a number of cases, that in such a situation, this court had lost all jurisdiction of and power to proceed with such pending cases. About one year after the admission of Nevada into the Union, and more than two years subsequent to the filing of the record of the case in this court, Congress passed the following statute:

“That all cases of appeal or writ of error heretofore prosecuted and now pending in the Supreme Court of the United States, upon any record from the Supreme Court of the Territory of Nevada, may be heard and determined by the Supreme Court of the United States; and the mandate of execution or of further proceedings shall be directed by the Supreme Court of the United States to the District Court of the United States for the District of Nevada, or to the Supreme Court of the State of Nevada, as the nature of said appeal or writ of error may require; and each of these courts shall be the successor of the Supreme Court of Nevada Territory as to all such cases, with full power to hear and determine the same, and to award mesne or final process thereon.”

A motion to dismiss had been filed in the case before the statute was passed, but the court, being advised that a bill was before Congress touching the matter, suspended action on the motion till it was seen what Congress might do. After the passage of the act, the motion to dismiss was renewed and was argued at great length by counsel for the defendant. The

argument in support of the motion is identical with that put forward by appellees in this case. Every contention as to the finality of judgments and vested rights and opening up of settled adjudications, made by counsel for appellees herein, was strongly urged upon the court in that case, as shown by the report. The court, however, was not impressed with the reasoning, and denied the motion to dismiss. In the following language the court strikingly disposes of the objections to the act (pages 173, 174, 175):

"It is objected to the act of 27th of February, just passed, that it is ineffectual for the purpose intended by it; that it is a retrospective act interfering directly with vested rights; that the result of maintaining it would be to disturb and impair judgments which, at the time of its passage, were final and absolute; that the powers of Congress are strictly legislative, and this is an exercise of judicial power, which Congress is not competent to exercise. But we are of opinion that these objections are not well founded. \* \* \* What good reason can be given why Congress should not remove the impediment which suspended the remedy in this case between two tribunals, neither of which could afford relief? What obstacle was in the way of legislation to supply the omission to make provision for such cases in the original act? If it comes within the category of retrospective legislation, as has been argued, we find nothing in the Constitution limiting the power of Congress to amend or correct omissions in previous acts. It is well settled that where there is no direct constitutional prohibition, a state may pass retrospective laws, such as, in their operation, may affect suits pending, and give a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings. \* \* \* If the judgment below was erroneous, the plaintiff in error had a moral right at least to have it set aside, and the defendant is only claiming a vested right in a wrong judgment. 'The truth is,' says Chief

Justice Parker, in *Foster v. Essex Bank*, 'there is no such thing as a vested right to do wrong, and the legislature which, in its acts, not expressly authorized by the Constitution, limits itself to correcting mistakes and to providing remedies for the furtherance of justice, cannot be charged with violating its duty, or exceeding its authority.' Such acts are of a remedial character, and are the peculiar subjects of legislation. They are not liable to the imputation of being assumptions of judicial power."

It is difficult to see why this case of *Freeborn v. Smith*, is not conclusive of the present question. The Supreme Court in that case had no jurisdiction of the appeal at the time of the passage of the Act. The case had, however, previously been taken to the Supreme Court, and, in a sense, was pending in that court when the Act was passed. Congress then says that all cases heretofore prosecuted on writ of error or appeal to and now pending in the Supreme Court, of which that court had no jurisdiction by reason of the omission of a saving clause in the Nevada enabling act, may be heard and determined in said court. In precisely the same manner, the Act of September 14, 1922, provides that cases theretofore appealed to and then pending in the Court of Appeals, as to which that court has no jurisdiction, shall not be dismissed, but shall be transferred to the Supreme Court. If the Act of September 14, 1922 had provided that the Court of Appeals should hear and determine such causes, instead of transferring them to this court, the statutes would be almost identical. As to the power of Congress to enact them, there is no possible distinction.

If Section 238-a might constitutionally have vested the Court of Appeals with jurisdiction of this case (as the

statute in *Freeborn v. Smith* conferred jurisdiction upon the Supreme Court), it is no objection to the Section that, instead, it directs a transfer of the case to this court. If the appeal is at all subject to the legislative power of Congress, Congress may vest jurisdiction in either court, at its discretion. Cases pending on appeal in one appellate court, may, without the violation of any constitutional guaranties, be, by statute, transferred to another appellate court for hearing and disposition.

*Duncan v. Missouri*, 152 U. S., 377, 14 S. Ct., 570;  
*Zellars v. Surety Co.*, 210 Mo., 86, 108 S. W., 548;  
*Branson v. Studebaker*, 138 Ind., 147, 33 N. E., 98.

3. The same principle as to the power of the legislature to legislate concerning pending controversies is applied in another line of similar cases.

It is well settled law that a statute, passed subsequent to the filing of a suit in a court which has no jurisdiction of the action in question, may vest that court with jurisdiction of the case, whether its lack of jurisdiction be as to the parties to the suit or as to the subject matter of the action. For example, a statute increasing the jurisdictional amount involved in suits which may be filed before a justice of the peace, may have the effect of vesting the justice with jurisdiction of cases filed before the act was passed, although no jurisdiction obtained in such cases prior to the act. Similarly, a jurisdictional requirement that the justice of the peace reside in the township in which the subject-matter of the action is located, or in which one of the parties re-

sides, may be abolished by statute, and thereby suits previously filed, which at the time were not cognizable by the justice, may be brought within his jurisdiction.

*Cunningham v. Dixon*, 15 Del., 163, 41 Atl., 519;

*Mather v. Chapman*, 6 Conn., 54;

*Muncie National Bank v. Miller*, 91 Ind., 441;

*Walpole v. Elliott*, 18 Ind., 258;

*Wilbourne v. Mann*, 81 So., 816 (Ala.)

## II.

It seems clear from the foregoing, that the appeal in this case was pending in the Court of Appeals when Section 238-a was enacted, and that therefore there is no constitutional objection to the application of the Act. Appellees' brief contains no suggestion that the Act cannot apply to pending appeals. Their whole argument is that *final* judgments cannot be affected by subsequent legislation.

1. On the contrary, the authorities are strong to the effect that it is within the power of Congress to make such a statute applicable even to cases wherein no appeal was pending when the statute was approved, and the time for appeal had expired.

It is well settled that litigants have no vested right in any particular remedy allowed by law for the enforcement of rights of action; and a remedy available when suit was filed or judgment obtained may be changed or abolished at the will of the legislature, provided only that a reasonably good remedy still remains or has been substituted for the

Appeals of the State, the judgment was affirmed in July, 1867. On August 22, 1872, West Virginia adopted a new constitution, containing the following section:

"No citizen of this State who aided or participated in the late war between the government of the United States and a part of the people thereof, on either side, shall be liable in any proceeding, civil or criminal; nor shall his property be seized or sold under final process issued upon judgments or decrees heretofore rendered, or otherwise, because of any act done, according to the usages of civilized warfare, in the prosecution of said war, by either of the parties thereto. The legislature shall provide, by general law, for giving full force and effect to this section by due process of law."

Thereafter, the original defendant brought this bill in equity against the plaintiff, to perpetually restrain the enforcement of said judgment, on the ground that the cattle were taken during the rebellion, according to the usage of civilized warfare. The court gave a decree as prayed. An appeal therefrom having been denied, the case is, on error to this court, affirmed. The court says:

"The proposition of the plaintiff in error is, that by the judgment of the Circuit Court of Preston County he had acquired a vested right in that judgment; that the judgment was his property; and that any act of the State which prevents his enforcing that judgment, in the modes which the law permitted at the time it was recovered, is depriving him of property without due process of law, and, therefore, forbidden by the 14th Amendment of the Federal Constitution. This right of the plaintiff to enforce that judgment is insisted upon as a vested right with which no authority can lawfully interfere.



Prior to the adoption of the 14th Amendment the power to provide such remedies, although they may have interfered with what were called vested rights, seems to have been fully conceded. The cases in which this had been decided in this court are *Calder v. Bull*, 3 Dall. 386; *Satterlee v. Matthewson*, 2 Pet. 380; *Sampeyreac v. United States*, 7 Pet. 222; *Watson v. Mercer*, 8 Pet. 88; and *Freeborn v. Smith*, 2 Wall. 160. In the latter case, Mr. Justice Grier, when the Congress of the United States had allowed an appeal where the judgment would have otherwise been final, used this language: 'If the judgment below was erroneous, the plaintiff in error had a moral right at least to have it set aside, and the defendant is only claiming a vested right in a wrong judgment.' And he thus quotes the language of Chief Justice Parker, in *Foster v. Essex Bank*, 16 Mass. 245: 'The truth is there is no such thing as a vested right to do wrong; and a legislature, which, in its acts not expressly authorized by the constitution, limits itself to correcting mistakes, and to providing remedies for the furtherance of justice, cannot be charged with violating its duty, or exceeding its authority.'

Many other cases might be cited in which it was held that retroactive statutes, when not of a criminal character, though effecting the rights of parties in existence, are not forbidden by the Constitution of the United States."

The lien of a prior final judgment may be abrogated by statute.

*Snyder v. Brewing Co.*, 173 Ind. 659, 90 N. E. 314;

*Curry v. Landers*, 35 Ala., 280;

*Daily v. Burke*, 28 Ala., 328;

*U. S. v. Sturgis*, 14 Fed. 810.



The right to revive a judgment previously obtained may be abolished by statute, though such a right existed when the judgment was rendered.

*Bartol v. Eckert*, 50 Oh. St. 31, 33 N. E. 294;  
*Gaffney v. Jones*, 44 Wash., 158, 87 Pac. 114.

The time within which the lower court may, for certain causes, vacate the judgment, may be extended by subsequent statute, enacted after the expiration of the period formerly allowed.

*Marston v. Humes*, 3 Wash. 267, 28 Pac. 520.

The following is an excerpt from the opinion in the latter case:

"The said act amending section 109 did not go into effect until some 10 months after the rendition of the judgment in question, and it is contended by petitioners that, inasmuch as under said section 109, as it stood at the time of the rendition of their judgment, the relief thereunder was confined to five months, that at the expiration of that time their interest in said judgment became a vested one, so far as said section 109 is concerned; and that thereafter no amendment of said section could affect their rights. With this contention, however, I cannot agree. Their right in the judgment did not become vested until the court had lost all power to relieve against the same, whether under section 109 or any other provision of the Code; and not being vested, it was competent for the legislature to extend or change the time within which it could be attacked in the court where rendered by any legislation which it thought proper to effect such result."

The time for redemption from prior judgments may constitutionally be extended.

*Dunn v. Dewey*, 75 Minn., 153, 77 N. W. 793.

The right to interest on prior judgments, allowed by law at the time of their rendition, may be abolished by subsequent legislation.

*Morley v. Lake Shore, etc. Ry. Co.*, 146 U. S. 162, 13 S. Ct., 14;

*Read v. Mississippi County*, 69 Ark. 365, 63 S. W. 807, affirmed, 188 U. S. 739, 23 S. Ct. 849;

*Wyoming Nat. Bk. v. Brown*, 7 Wyo., 494, 53 Pac. 291.

6. The courts of last resort have sustained a great variety of retroactive statutes affecting, very materially, contract and property rights.

A statute abolishing the usury law may be taken as a typical example. A promissory note, unenforceable when made, because usurious, may be validated by a subsequent repeal of the usury statute. This court, in the leading case of *Ewell v. Daggs*, 108 U. S. 143, so states the law:

To the same effect are:

*Peterson v. Berry*, 125 Fed. 902;

*Coe v. Miller*, 77 So. 88 (Fla)

In like manner, contracts and deeds unenforceable (or even void) when entered into because of some failure

to comply with legal requirements, may be given validity by subsequent statutes changing or repealing the statutes in force at the time of their execution.

*Satterlee v. Matthewson*, 2 Pet. 380;

*Watson v. Mercer*, 8 Peet. 88;

*Randall v. Kreiger*, 23 Wall. 137;

*Gross v. U. S. Mortgage Co.*, 108 U. S. 477;

*West Side Belt Ry. v. Pittsburg Construction Co.*,  
219 U. S. 92, 31 S. Ct., 196;

*Jenkins v. Union Savings Assn.*, 132 Minn., 19,  
155 N. W. 765;

*Clark v. Dorr*, 156 Ind., 692, 60 N. E. 688;

*Sullivan v. Ammons*, 95 Miss., 106, 48 So. 244.

The leading cases on the point are reviewed by the court in *West Side Belt Ry. v. Pittsburg Construction Co.*, 219 U. S. 92, 31 S. Ct., 196, to which reference is especially made.

Of like effect are curative statutes, validating defects in prior municipal bond elections. Such statutes are held to be constitutional, although, but for them, the bonds would be unenforceable. In *Camp v. State*, 71 Fla., 381, 72 So. 483, the court, in upholding such a statute, declines to follow the contention that it divests vested rights.

This court in *Utter v. Franklin*, 172 U. S. 416, 19 S. Ct. 183, sustained the constitutionality of a subsequent statute curing defects in a municipal bond issue, although prior to the passage of the act the bonds had been adjudged void by this court.

A void marriage may be rendered valid by a statute subsequently enacted, even though vested property rights are thereby affected.

*Goshen v. Stonington*, 4 Conn., 209.

An unlicensed physician, unable to recover the value of the services rendered by him, by the law in force at the time of their performance, may acquire such a right by a change in the law.

*Hewitt v. Wilcox*, 1 Metc. (Mass) 154.

An occupying claimant statute, giving to occupying claimants the right of reimbursement for improvements made on the land, may be applied retroactively with respect to improvements as to which no such right previously existed.

*Claypoole v. King*, 21 Kan., 602.

The following decisions uphold similar types of retroactive statutes affecting property interests:

*Independent School Dist. v. Smith*, 181 N. W. 1  
(Ia.)

*Scales v. Otts*, 127 Ala., 582, 29 So. 63;

*Royston v. Miller*, 76 Fed. 50;

*Boss v. Roanoke Navigation Co.*, 111 N. C. 439,  
16 S. E. 402.

In *Legal Tender Cases*, 110 U. S. 421, an Act of Congress making United States treasury notes legal tender for the payment of private debts is held to be constitutional, as to debts incurred both before and after its passage.

The case of *Foster v. Essex Bank*, 16 Mass., 245, is a leading case with respect to the validity of a statute which continued certain corporations in existence for a period of three years after their charters would otherwise have expired, for the purpose of suing and being sued. It was ably argued that such a statute was invalid, as an impairment of vested rights, but the court upheld the Act. The court, at page 273 of the opinion, says:

“Many statutes have been referred to in the argument, which are much more questionable, as to their constitutionality, than the one under consideration. The statutes of limitation, operating upon contracts already in force:—The suspension of those statutes, after the debtor may have considered that he had a right to be discharged within a certain period:—The statutes made for curing defects in the proceedings of courts, towns, officers, etc., when the party to be affected might be said to have a vested right to take advantage of the error. The truth is, there is no such thing as a vested right to do wrong; and a legislature, which, in its acts not expressly authorized by the constitution, limits itself to correcting mistakes, and to providing remedies for the furtherance of justice, cannot be charged with violating its duty, or exceeding its authority.”

The same court, in *Converse v. Ayres*, 197 Mass., 443, 84 N. E. 98, in sustaining a statute giving judgment cred-

itors of corporations greater rights as against stockholders, says:

"It thus being obvious that as the law stood, while resident stockholders could be made to respond, foreign stockholders escaped, further legislation was enacted to supplement existing statutes, by providing a form of procedure which would remove the jurisdictional difficulty."

A statute very similar to the one involved in the above case was upheld in *Moore v. Riply*, 106 Ga., 556, 32 S. E. 647.

7. It is well established that a statute cutting down the period of a prior statute of limitations may apply to existing rights of action.

*Terry v. Anderson*, 95 U. S. 628;

*Koshonong v. Burton*, 104 U. S. 668;

*Wheeler v. Jackson*, 137 U. S. 245.

Furthermore, it is the established law in this court, and in many state tribunals, that an act is valid which removes the bar of a statute of limitations the period of which has expired. *Campbell v. Holt*, 115 U. S. 620, is the leading case on the point. The reasoning of the court is as follows:

"It is much insisted that this right to defence is a vested right, and a right of property which is protected by the provisions of the Fourteenth Amendment.

It is to be observed that the word vested right is nowhere used in the Constitution, neither in the original instrument nor in any of the amendments to it.

We understand very well what is meant by a vested right to real estate, to personal property, or to incorporate hereditaments. But when he got beyond this although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the Constitution.

We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right, so as to be beyond legislative power in a proper case. The statutes of limitation, as often asserted and especially by this court, are founded in public needs and public policy—are arbitrary enactments by the law-making power. *Tioga Railroad v. Blossburg and Corning Railroad*, 20 Wall. 137, 150. And other statutes, shortening the period or making it longer, which is necessary to its operation, have always been held to be within the legislative power until the bar is complete. The right does not enter into or become a part of the contract. No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore, when the legislature says, time shall be no bar, though such was the law when the contract was made. The authorities we have cited, especially in this court, show that no right is destroyed when the law restores a remedy which had been lost."

There was a similar holding by this court in *Stewart v. Kahn*, 11 Wall. 493, with respect to the Act of June 11, 1864, suspending the running of the statute of limitations during the Civil War. The court says:

"A severe and literal construction of the language employed might conduct us to the conclusion, as has been insisted in another case before us, that this clause was intended to be made wholly prospective as to the period to be deducted, and that it has no application where the action was barred at the time

of its passage. Such, we are satisfied, was not the intention of Congress. A case may be within the meaning of a statute and not within its letter, and within its letter and not within its meaning. The intention of the law-maker constitutes the law. The statute is a remedial one and should be construed liberally to carry out the wise and salutary purpose of its enactment. The construction contended for would deny all relief to the inhabitants of the loyal States having causes of action against parties in the rebel States if the prescription had matured when the statute took effect, although the occlusion of the courts there to such parties might have been complete from the beginning of the war down to that time. The same remarks would apply to crimes of every grade if the offenders were called to account under like circumstances. It is not to be supposed that Congress intended such results. There is no prohibition in the Constitution against retrospective legislature of this character. We are of the opinion that the meaning of the statute is that the time which elapsed while the plaintiff could not prosecute his suit, by reason of the rebellion, whether before or after the passage of the act, is to be deducted. Considering the evils which existed, the remedy prescribed, the object to be accomplished, and the considerations by which the law-makers were governed lights which every court must hold up for its guidance when seeking the meaning of a statute which requires construction—we cannot doubt the soundness of the conclusion at which we have arrived.”

The Federal Transportation Act of February 28, 1920, paragraph f, of section 206, provides:

“The period of federal control shall not be computed as a part of the period of limitation in actions against carriers or in claims for reparation to the commission for causes of action arising prior to federal control.”



In *Standley v. United States Railroad Administration* (D. C. Ohio), 271 Fed. 794, it was held that the above provision was applicable to a cause of action which was fully barred under the law as it stood in Ohio before the approval of the Transportation Act. The court, said (p. 795):

"This language applies to plaintiff's cause of action, and admits of no other interpretation than that the period of federal control is not to be taken into account in computing the period of time within which causes of action are barred by statutes of limitation.

\* \* \* Nor can any question be properly made respecting the power of Congress to enact this legislation. Plaintiff's action, it is true, was barred February 28, 1920, when this act was approved; but there is no constitutional prohibition forbidding the removal of the bar of the statutes of limitations against causes of action based upon debts, claims, or personal demands, even though the bar has already attached when the act is passed. *Campbell v. Holt*, 115 U. S., 620; 12 Corpus Juris, p. 780, Section 576."

A like conclusion with respect to the same federal statute was reached in *Wenatchee Produce Co. v. Great Northern Ry. Co.* (D. C. Wash.) 271 Fed. 784.

The following state decisions, among others, are to the same effect:

*Danforth v. Groton Water Co.*, 178 Mass. 472, 39 N. E. 1033;

*Jackson Hill Coal & Coke Co. v. Board of Commissioners* 181 Ind. 335, 104 N. E. 497.

4

In *Hinton v. Hinton*, 61 N. C. (1 Phil. L. ) 410, it was held that a statute giving a widow six months in which to dissent from the provision of a will and elect to take dower as at common law, does not confer a right of dower, but is a statute of limitations upon that right, and therefore that a later statute extending the time for such dissent, is constitutional, and applies to a case barred before its passage.

8. The foregoing decisions, cited under subdivision II of this memorandum, seems to establish a proposition of law which should be conclusive of this controversy. That proposition is variously stated in the cases. It appears in the following forms, among others: "There is no such thing as a vested right to do wrong;" "There is no vested right to defeat a just debt;" "A vested right is one of which a person cannot be deprived without injustice;" "A party has no vested right in a defense based upon an informality not affecting his substantial equities;" "There is no vested right in a remedy or rule of procedure;" "The theory of vested rights does not prevent the curing of mere irregularities." None of these formulae can be applied, in a rule of thumb fashion, to a particular statute, as a definite unanswerable test of constitutionality. Certain difficulties of application are inherent in them all. At the basis of them all, however, there is a real principle of law. Justice Holmes, then Chief Justice of the Supreme Judicial Court of Massachusetts, in the case of *Danforth v. Groton Water Co.*, 178 Mass., 472, 59 N. E. 1033, summarized the cases, and the rule established by them, as follows:

"But however that may be, multitudes of cases have recognized the power of the legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small."

The decision in *Danforth v. Groton Water Company* is so precisely in point here that the entire opinion may be referred to as supporting the position of appellants *in toto*. Justice Holmes has rightly deducted from the cases the real principle at their basis. Under that principle, the power of Congress to enact Section 238-a of the Judicial Code really depends upon the equity, or moral worth, or substantial justice of such legislation as set over against the moral worth or value of the right which the statute takes away.

There is little substantial moral worth in the right which appellees are asserting. If the judgment below be a proper one, appellees will not be injured by a further review of the case. If that judgment is wrong and should be reversed, no equitable right is denied by rehearing and reversal.

On the other hand there are very strong equities in favor of the statute. The language of Chief Justice Taft quoted at the beginning of this brief characterizes as a "trap" the condition existing before the enactment of the statute. The contention of appellees is that while Congress may properly provide relief for appellants who have not yet fallen into the "trap" no help can be extended to an unfortunate victim already entrapped. Certainly every in-

tendment should be made in favor of a statute intended to prevent a miscarriage of justice in a matter of simple appellate procedure.

A very able article by the Hon. Charles W. Bunn, of St. Paul, Minnesota, with respect to the appellate jurisdiction of this court, appearing in the Harvard Law Review for June, 1922, at page 902 begins as follows:

"The jurisdiction of the Supreme Court of the United States to review judgments of the District Court and Circuit Court of Appeals should be easy to determine and free from doubt. In many cases it is far from that."

The court should not make litigants suffer from this ambiguity in the statutes in the absence of a clearly compelling consideration. There is certainly no justice in penalizing the appellant to the extent of the loss of his entire cause of action, because his attorney cannot determine from the prior decisions of this court whether the appeal should be brought here or go to the Court of Appeals.

9. Much is made by appellees of the fact that the appeal to the Circuit Court of Appeals was not taken until after the expiration of the three months' period for an appeal to the Supreme Court. There is nothing whatever in this point. If, as contended by appellees, the appeal to the Court of Appeals was a nullity, then it could have made no difference that such appeal was attempted prior to the expiration of the three months rather than thereafter. In either event, under the contention, there would have been no *real* appeal, and hence the judgment would have been unappealed from during the allowed time. The time

of the appeal to the Court of Appeals is entirely immaterial.

This court has already sustained the validity of section 238-a as applied to a pending appeal to the wrong court in a criminal case, in *Heilter v. United States*, 43 Sup. Ct. 185. This decision seems to be a direct authority for denying the motion to dismiss herein. Chief Justice Taft, rendering the opinion of the court in that case, says of Section 238-a:

“This is a remedial statute and should be construed liberally to carry out the evident purpose of Congress.”

The judgment below in that case was entered more than sixteen months before the approval of Section 238-a, yet the court applies the section and transfers the case to the proper court.

### III.

The sole basis for the motion to dismiss is the claim that Section 238-a is unconstitutional as applied to the present appeal. The determination of this question in favor of appellees would dispose of the appeal without an opportunity for a hearing on the merits. This is the situation in both the *Abernathy* and *Hagerman* cases pending here. The third case, involving identical questions on the merits, was retained by the Court of Appeals because of a diversity of citizenship which did not appear in the *Abernathy* and *Hagerman* cases. It has been argued in that court, and will without doubt come to this court after decision there.

In view of the gravity of the constitutional question and of the recognized policy of this court not lightly to set aside acts of Congress, we respectfully request an opportunity to argue orally the motion dismiss, and also the motion to remand, by special assignment, or if that be impossible, then at the argument on the merits. If our position can be made clear to the court, we believe there can be no question but that jurisdiction will be retained.

Respectfully submitted,

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NOV 23 1923  
WM. R. STANLEY

IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1923

McMILLAN CONTRACTING COMPANY  
AND FIDELITY NATIONAL BANK &  
TRUST COMPANY OF KANSAS CITY,  
*Appellants,*

v.

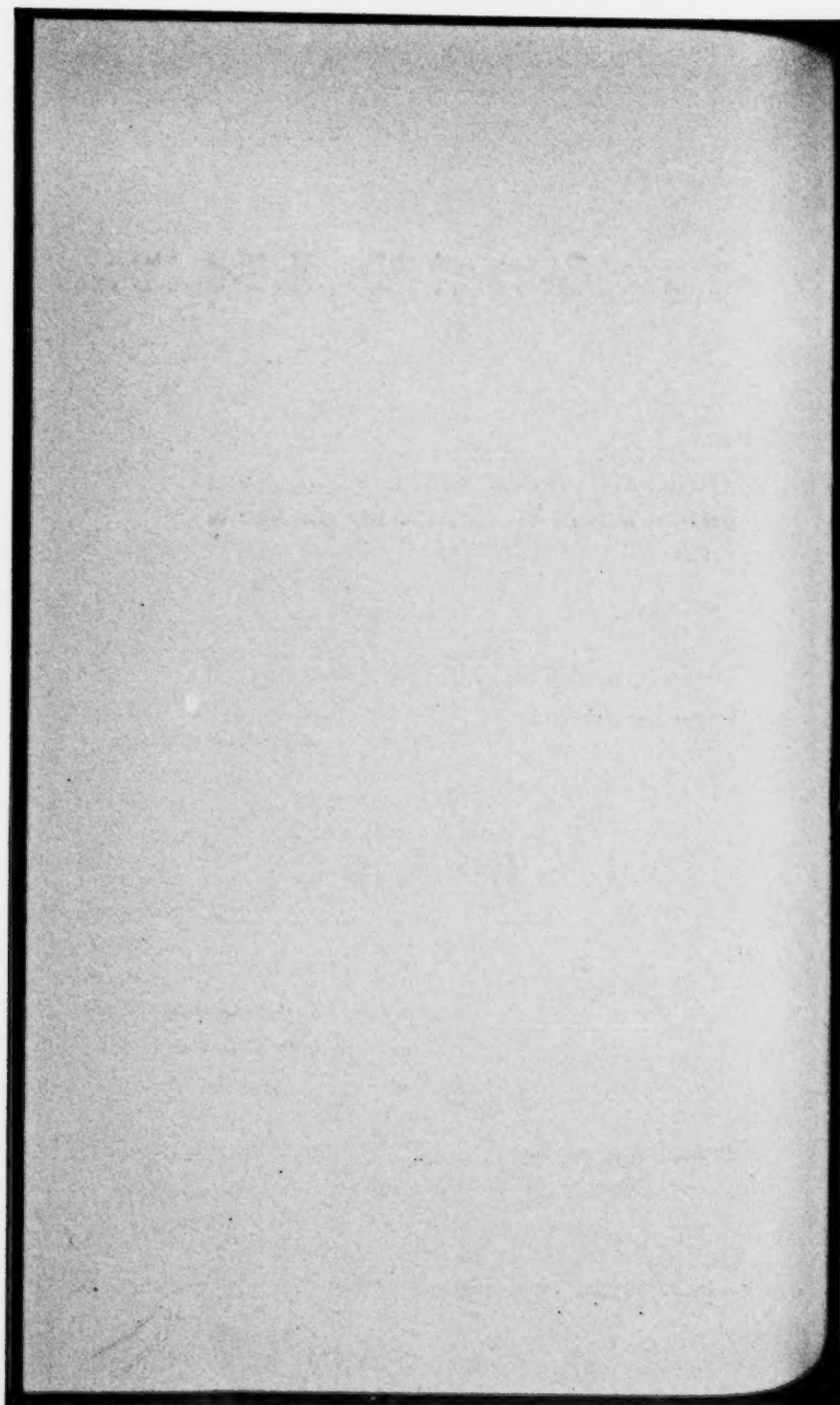
NO. 167

WALTER L. ABERNATHY AND CARRIE  
S. ABERNATHY,  
*Appellees.*

**Brief on Behalf of Appellants.**

JUSTIN D. BOWERSOCK,  
SAM'L J. McCULLOCH,  
FRANK P. BARKER,  
G. V. HEAD,

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IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1923

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McMILLAN CONTRACTING COMPANY  
AND FIDELITY NATIONAL BANK &  
TRUST COMPANY OF KANSAS CITY,  
*Appellants,*

v.

NO. 167

WALTER L. ABERNATHY AND CARRIE  
S. ABERNATHY,  
*Appellees.*

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE WESTERN DISTRICT OF MISSOURI, TRANSFERRED FROM THE  
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH  
CIRCUIT.

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**Brief on Behalf of Appellants.**

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**STATEMENT.**

This is a suit to cancel and set aside certain tax bills issued by Kansas City, Missouri, and to have complainants' land adjudged free of any liens on account thereof. The tax bills, purported to be issued under the authority of the

charter of Kansas City and in accordance with the provisions of said charter, and particularly Section 28 of Article VIII thereof, for the grading of Meyer Boulevard in said city.

The bill alleges four distinct grounds for holding the tax bills void: *first*, that Section 28 of Article VIII of the charter of Kansas City, Ordinance No. 21831 (providing for the grading of said boulevard) and all proceedings thereunder are in violation of the Constitution of the United States (Trans. 12); *second*, that the charter and ordinance were not complied with, in that a certain suit required therein to be filed was not filed (Trans. 10); and *third*, that said Section 28 was violated in the issuance of the bills, in that the tax bills were not levied in proportion to the benefits accruing to the several parcels of land (Trans. 14).

The answers denied all these violations. They alleged further that the suit required by the charter and ordinance had been filed and that the judgment therein was *res judicata* of all questions of fact raised by the bill (Trans. 18).

The District Court set the tax bills aside, the decree specifying no particular ground for such action (Trans. 20-21). The opinion filed by the District Judge indicates that he determined the case upon the ground that the benefit district and the assessment were arbitrary and unreasonable. (Trans. 126-133). From this decree, an appeal was duly prosecuted to the United States Circuit Court of Appeals for the Eighth Circuit (Trans. 22-26), and by that court the case was transferred here pursuant to Section 238A of the Judicial Code (Trans. 136).

The portion of Meyer Boulevard graded under these proceedings forms an approach to the entrance of Swope Park, one of the large parks of Kansas City. It connects the park with the boulevard system. As its name implies,



it is a broad avenue or parkway, varying from 220 to 500 feet in width. It has two paved driveways with spaces for flowers and planting both between and outside the driveways. In order to make it an adequate and imposing approach to the great park, it was graded in a substantial plane throughout the portion involved in these proceedings, and for this reason, it was deemed by the city authorities too large an undertaking to be paid for in the usual charter method of assessing the cost of grading, i. e., an assessment against the abutting property only. It was, therefore, determined to assess the cost against a larger benefit district provided for in Section 28 of Article VIII of the Kansas City Charter, hereinafter set out, a section adopted to relieve abutting property in cases of unusually burdensome grading.

For this purpose, the proper authorities established a benefit district extending along both sides of the proposed boulevard for the full length of the portion to be graded and in width from 63rd Street on the north to 67th Street on the south. The boulevard runs a somewhat irregular course, averaging 500 to 600 feet south of the east-and-west center line of this district, which is a broad, open area. North of 63rd Street, the land is platted and considerably occupied with residences, and is served by 63rd Street and other streets northward into the city. South of 65th Street the land slopes rapidly to the south, is platted into small residence lots and is of a character to be served rather by street cars than by automobiles and other vehicles. The benefit district is unplatted and, therefore, better adapted to development as boulevard property. It is some six miles from the business center, is high and slightly and is very desirable for residence purposes.

Prior to letting the contract for the grading, a suit was filed in the Circuit Court of Jackson County by the city against the owners of the respective tracts in the benefit district to determine the validity of the proceedings, the propriety of the benefit district and the inclusion and exclusion of lands therein and therefrom. Service was had by publication against such owners in accordance with the charter provision; a trial was had; the district approved the proceedings and no appeal taken.

In reliance on this judgment, the contract was let, the work done, the benefit assessed and the tax bills issued, all in due and legal manner, unless some one or more of the objections urged thereto by appellee be held to invalidate the bills.

The facts bearing upon each of the contested points will be further referred to in connection with such points respectively.

### SPECIFICATION OF ERRORS.

1. The court erred in not finding and holding that the provisions of Section 28 of Article 8 of the Charter of Kansas City, Missouri, had been complied with in the matter of the suit required by that Section to be filed in the Circuit Court of Jackson County, Missouri, and in all other matters required by that Section.
2. The court erred in not finding and holding that the judgment in the suit filed in the Circuit Court of Jackson County, Missouri, under the provisions of said Section 28, was and is *res judicata* as to the propriety and reasonableness of the benefit district fixed by Ordinance Number 21831, as to the method of apportionment and as to all other matters that were or might have been litigated therein.
3. The court erred in ruling that the benefit district was arbitrary and unreasonable.
4. The court erred in ruling that the assessment was arbitrary and unreasonable.
5. The court erred in holding that the tax bills involved in this action exceeded the special benefits received by the lands in question.
6. The court erred in holding that the tax bills unreasonably exceeded the benefit, or any possible benefit to the lands in question.
7. The court erred in holding that the improvement in question was in its nature a general public improvement, rather than a local improvement.

8. The court erred in holding that the method of apportionment within the benefit district was arbitrary and unreasonable.

9. The court erred in decreeing that the tax bills were null and void and that the land in question be released from said tax bills.

10. The court erred in making any finding as to the relation between the amount of the tax bills in question and the values of the lands in controversy, for the reason that there was no competent evidence as to such values.

11. The court erred in holding the amounts of the tax bills in question to be unreasonable or confiscatory for the reason that there was no competent evidence as to the values of the lands in controversy.

12. The court erred in making any finding as to the extent of the special benefits received by the respective tracts for the reason that there was no competent evidence as to such benefits, and erred in admitting any evidence on that issue.

13. The court erred in determining the validity of the tax bills in question upon the relation between the amount of each tax bill and the extent of the special benefit to the respective tract covered by such bill.

## POINTS AND AUTHORITIES.

## I.

**Section 28 of Article VIII of the Kansas City Charter does not violate the Constitution of the United States.**

- West v. Burke*, 286 Mo., 358, 228 S. W., 775;  
*Nichols v. Kansas City*, 291 Mo., 690, 237 S. W., 107;  
*Embree v. Kansas City and Liberty Boulevard Road District*, 240 U. S. 242, 36 S. Ct. 317, affirming 257 Mo., 593;  
*Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 17 S. Ct., 56;  
*Hagar v. Reclamation District*, 111 U. S., 701, 4 S. Ct., 663;  
*Houck v. Little River Drainage District*, 239 U. S., 254, 36 S. Ct., 58;  
*Saxton National Bank v. Carswell*, 126 Mo., 436, 29 S. W., 279;  
*Corrigan v. Kansas City*, 211 Mo., 608, 111 S. W., 115;  
*Ross v. Gates*, 183 Mo., 338, 81 S. W., 1109;  
*French v. Barber Asphalt Paving Co.*, 181 U. S., 324, 21 S. Ct., 625;  
*McGhee v. Walsh*, 249 Mo., 266, 155 S. W., 445;  
*Heman v. Allen*, 156 Mo., 534, affirmed 181 U. S., 402, 21 S. Ct., 645;  
*Wagner v. Baltimore*, 239 U. S., 207, 36 S. Ct., 66;  
*Wagner v. Leser*, 239 U. S., 207, 36 S. Ct., 66;  
*Parsons v. District of Columbia*, 170 U. S., 45, 18 S. Ct., 521;

*Tonawanda v. Lyon*, 181 U. S., 389, 21 S. Ct., 609;  
*Construction Co. v. Shovel Co.*, 211 Mo., 524, 111  
 S. W., 86.

## II.

**Ordinance No. 21831, providing for the grading of Meyer Boulevard, does not violate the United States Constitution.**

*Naylor v. Harrisonville*, 207 Mo., 341, 105 S. W.,  
 1074;  
*Heman v. Allen*, 156 Mo. 534, affirmed as *Shumate*  
*v. Heman*, 181 U. S., 402, 21 S. Ct., 645;  
*Williams v. Eggleston*, 170 U. S., 304, 18 S. Ct.,  
 617;  
*Nichols v. Kansas City*, 291 Mo., 690, 237 S. W.,  
 107;  
*Spencer v. Merchant*, 125 U. S., 345, 8 S. Ct., 921;  
*Brougham v. Kansas City*, 263 Fed., 115;  
*Carson v. Sewer Commissioners*, 182 U. S., 398, 21  
 S. Ct., 860;  
*Fallbrook Irrigation Co. v. Bradley*, 164 U. S., 112,  
 17 S. Ct., 56;

**(a) The grading of Meyer Boulevard is an improvement of such a nature that its cost may lawfully be charged against a local benefit district.**

*Kansas City v. Bacon*, 147 Mo., 259, 48 S. W., 860;  
*Kansas City v. Bacon*, 157 Mo., 450, 57 S. W., 1075;  
*French v. Barber Asphalt Paving Co.*, 181 U. S.,  
 324, 21 S. Ct., 625;

## (b) The benefit district was not fixed arbitrarily.

- Barber Asphalt Paving Co. v. French*, 158 Mo., 534, 58 S. W., 934;
- Chadwick v. Kelley*, 187 U. S., 540, 23 S. Ct., 175;
- McGhee v. Walsh*, 249 Mo., 266, 155 S. W., 445;
- Heman v. Schulte*, 166 Mo., 409, 66 S. W., 163;
- Keith v. Bingham*, 100 Mo., 300, 13 S. W., 89;
- Louisville & Nashville R. R. v. Barber Asphalt Paving Co.*, 197 U. S., 430, 25 S. Ct., 466;
- Kansas City v. Ward*, 134 Mo., 172, 35 S. W., 600;
- Bauman v. Ross*, 167 U. S., 548, 17 S. Ct., 966;
- French v. Barber Asphalt Paving Co.*, 181 U. S., 324, 21 S. Ct., 625;
- Houck v. Little River Drainage District*, 239 U. S., 254, 36 S. Ct., 58;
- Kansas City v. Bacon*, 147 Mo., 259, 48 S. W., 860;
- Corrigan v. Kansas City*, 211 Mo., 608, 111 S. W., 115;
- Kansas City Grading Co. v. Holden*, 107 Mo., 305, 17 S. W., 798;
- Mullins v. Cemetery Assn.*, 268 Mo., 691, 187 S. W., 1169;
- Northern Pacific R. R. v. Seattle*, 46 Wash., 674, 91 Pac., 244;
- Construction Co. v. Shovel Co.*, 211 Mo., 524, 111 S. W., 86;
- Voris v. Pittsburgh Plate Glass Co.*, 163 Ind., 599, 70 N. E., 249;

(c) That a larger district was assessed with the cost of condemning land for the boulevard is immaterial.

*Houch v. Little River Drainage District*, 239 U. S. 254, 36 S. Ct., 58.

(d) That property not abutting on the improvement cannot be benefited as much as abutting property is immaterial.

*Embree v. Kansas City and Liberty Road District*, 240 U. S., 242, 36 S. Ct., 317;

*Kansas City v. Bacon*, 147 Mo., 259, 48 S. W., 860;

*Kansas City v. Bacon*, 157 Mo., 450, 57 S. W., 1075;

*Walston v. Nevin*, 128 U. S., 578, 9 S. Ct., 192;

*Spencer v. Merchant*, 125 U. S., 345, 8 S. Ct., 921;

*Bauman v. Ross*, 167 U. S., 548, 17 S. Ct., 966.

### III.

The proceedings subsequent to the ordinance do not violate the Constitution of the United States.

*Parsons v. District of Columbia*, 170 U. S., 45, 18 S. Ct., 521;

*Hagar v. Reclamation District*, 111 U. S., 701, 4 S. Ct., 663;

*Voigt v. Detroit*, 184 U. S., 115, 22 S. Ct., 337;

*Wight v. Davidson*, 181 U. S., 371, 21 S. Ct., 616;

*Pittsburg R. R. v. Board of Public Works*, 172 U. S., 32, 19 S. Ct., 90;

*In re Amsterdam*, 126 N. Y., 158, 27 N. E., 272;



*Walston v. Nevin*, 128 U. S., 578, 9 S. Ct., 192;  
*Embree v. Kansas City and Liberty Boulevard  
 Road District*, 240 U. S., 242, 36 S. Ct., 317;  
*Winona & St. Paul Land Co. v. Minnesota*, 159 U.  
 S., 526, 16 S. Ct., 83;  
*St. Louis v. Richeson*, 76 Mo., 470;  
*King v. Portland*, 184 U. S., 61, 22 S. Ct., 290;  
*Neil v. Ridge*, 220 Mo., 233, 119 S. W., 619;  
*First National Bank v. Nelson*, 64 Mo., 418;  
*Nichols v. Kansas City*, 291 Mo., 690, 237 S. W.,  
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*Saxton National Bank v. Carswell*, 126 Mo., 436,  
 29 S. W., 152;  
*Weyerhaeuser v. Minnesota*, 176 U. S., 550, 20 S.  
 Ct., 485;  
*Kentucky Railroad Tax Cases*, 115 U. S., 321, 6 S.  
 Ct., 57;  
*Wells Fargo & Co. v. Nevada*, 248 U. S., 165, 39 S.  
 Ct., 62;  
*Kansas City v. Huling*, 87 Mo., 203;  
*Barnes v. Pikey*, 239 Mo., 398, 196 S. W. 883.

## IV.

**There was no testimony of excessive valuation, or of  
 discrimination in valuation, or of any value at all.**

22 Corpus Juris, 178, Sec. 122.

13 Ency. of Evi., 454.

*Girard Trust Co. v. Philadelphia*, 248 Pa., 179, 93  
 Atl., 947;

*Wayland v. Seattle*, 96 Wash., 344, 165 Pac., 113;

- Marine Coal Co. v. Pittsburgh M. & Y. R. R. Co.*,  
246 Pa., 478, 92 Atl., 688;  
*Hildreth v. City of Longmont*, 47 Col., 79, 105 Pac.,  
107;  
*Baltimore v. Carol*, 128 Md., 68, 96 Atl., 1076;  
*Suffolk & C. Ry. Co. v. West End Land Co.*, 137  
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*Fort Collins Dev. Co. v. France*, 41 Col., 512, 92  
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*Savannah Ry. v. Bufford*, 106 Ala., 303, 17 So.,  
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*Denver & R. G. R. Co., v. Heckman*, 45 Col., 470,  
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*Kelly v. Peoples Nat. F. I. Co.*, 262 Ill., 158, 104  
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*Martin v. N. Y. & N. E. Ry. Co.*, 62 Conn., 331, 25  
Atl., 239;  
*Hamilton v. Seaboard Air Line*, 150 N. C., 193, 63  
S. E., 730;  
*Rev. St. Mo.*, 1919, Sections 13, 150, 13, 154.

## V.

Even if it be established by competent evidence that the tax bills against complainants' lands exceed the special benefit thereto, such fact would not be sufficient to invalidate the tax bills.

- St. Louis v. Brewing Co.*, 96 Mo., 677, 10 S. W.,  
477;  
*Michael v. St. Louis*, 112 Mo., 610, 20 S. W., 666;

*St. Louis v. Ranken*, 96 Mo., 497, 9 S. W., 910;  
*Chadwick v. Kelley*, 187 U. S., 540, 23 S. Ct., 175;  
*Prior v. Construction Co.*, 170 Mo., 439, 71 S. W.,  
 205;  
*Heman Construction Co. v. Wabash R. R.*, 206 Mo.,  
 172, 104 S. W., 67.

## VI.

The suit in the Circuit Court of Jackson County complies with the provisions of the charter and ordinances and comports with due process of law.

### A. The suit complies with the charter and ordinances.

Sec. 24, of Art. VIII, Charter of Kansas City;  
*Collins v. Jaicks*, 279 Mo., 404, 214 S. W., 397.

#### (1). The proceeding is in the name of the city.

*State v. Patton*, 42 Mo., 530;  
*Livingston v. Coe*, 4 Neb., 379;  
*Beattie v. Lett*, 28 Mo., 596;  
*Ammerman v. Crosby*, 26 Ind., 451;  
*Smith v. Watson*, 28 Ia., 218;  
*In re Clary's Estate*, 112 Cal., 292, 44 Pac., 569;  
*Kansas City v. Mastin*, 169 Mo., 80, 68 S. W., 1037.

#### (2). The proceeding is against the respective land owners.

*Goodrich v. Detroit*, 184 U. S., 432, 22 S. Ct., 397;

*Jackson v. Waterway District*, 85 Wash., 301, 147 Pac., 1140;  
*Reed v. Cedar Rapids*, 137 Ia., 107, 111 N. W., 1013;  
*Black v. McGonigle*, 103 Mo., 192, 16 S. W., 615;  
*State ex rel. v. Lundquist*, 103 Wash., 339, 174 Pac., 440;  
*Lingo v. Burford*, 112 Mo., 149, 20 S. W., 459;  
*Nemally v. Joest*, 74 Ind., 409;  
*Fitzgerald v. De Soto Special Road District*, 195 S. W., 695, (Mo.).

**B. Even if the suit was defective, the defects are not fatal since the suit is not necessary to due process.**

*Saxton National Bank v. Carswell*, 126 Mo., 436, 29 S. W., 152;  
*Voight v. Detroit*, 184 U. S., 115, 22 S. Ct., 337;  
*Paulsen v. Portland*, 149 U. S., 30, 13 S. Ct., 750;  
*Walston v. Nevin*, 128 U. S., 578, 9 S. Ct., 192.

**C. The suit comports with due process of law.**

*Kansas City v. Duncan*, 135 Mo., 571, 37 S. W., 624;  
*Kansas City v. Ward*, 134 Mo., 172, 35 S. W., 600;  
*Kansas City v. Mastin*, 169 Mo., 80, 68 S. W., 1037;  
*Lent v. Tillson*, 140 U. S., 316, 11 S. Ct., 825;  
*State v. Blair*, 245 Mo., 680, 151 S. W., 148;  
*State ex rel. v. Wilson*, 216 Mo., 215, 115 S. W., 549;

*Doris v. Pittsburgh Plate Glass Co.*, 163 Ind., 599,  
70 N. E., 249;  
*Cleveland Ry. Co. v. Porter*, 210 U. S., 177, 28 S.  
Ct., 647.

## VII.

The suit in the Circuit Court finally determined all questions raised or involved therein, and all such questions are now *res judicata*.

*Muskral v. U. S.*, 219 U. S., 346, 31 S. Ct., 250;  
*State ex rel. v. Westport*, 135 Mo., 120, 36 S. W.,  
663;  
*Tregea v. Modesto Irrigation District*, 164 U. S.,  
179, 17 S. Ct., 52;  
*Gibler v. Mattoon*, 167 Ill., 18, 47 N. E., 319;  
*Morgan Creek Drainage Dist. v. Hawley*, 255 Ill.,  
34, 99 N. E., 68;  
*People v. Linda Vista Irrigation Dist.*, 128 Cal.,  
477, 61 Pac., 86;  
*Rialto Irrigation Dist. v. Brandon*, 103 Cal., 384,  
37 Pac., 484;  
*In re Union Railway Co.*, 112 N. Y., 61, 19 N. E.,  
664;  
*Gelston v. Hoyt*, 3 Wheaton, 246;  
*Meriwether v. Block*, 31 Mo. App., 170;  
*First Nat. Bk. v. McCaskill*, 174 N. C., 362, 93 S.  
E., 905;  
*Christianson v. King County*, 239 U. S., 356, 36  
S. C., 114;

*St. Louis v. United Rys.*, 263 Mo., 387, 174 S. W., 78;

*Spratt v. Early*, 199 Mo., 491, 97 S. W., 925;

*Little River Drainage District v. Railroad*, 236 Mo., 94, 139 S. W., 330;

*McGhee v. Walsh*, 249 Mo., 266, 155 S. W., 445.

### VIII.

Since the trial and judgment in this case, the Supreme Court of Missouri has decided a case involving the questions raised in this case.

*Schmelzer v. Kansas City*, 295 Mo., 322, 243 S. W., 946;

*Forsyth v. Hammond*, 166 U. S., 506, 17 S. Ct., 665;

*Wade v. Travis Co.*, 174 U. S., 499, 19 S. Ct., 887;

*Mo. etc. R. Co. v. Cade*, 233 U. S., 642, 34 S. Ct., 678;

*Quinette v. Pullman Co.*, (C. C. A. 8th Cir.) 229 Fed., 333, 143 C. C. A., 453;

*Thomas Cusack Co. v. Chicago*, 242 U. S., 526, 37 S. Ct., 190;

*St. Louis etc. R. Co. v. Quinette*, (C. C. A. 8th Cir.) 251 Fed., 773, 164 C. C. A., 7.

## **BRIEF OF THE ARGUMENT.**

The charge that the charter, ordinance and proceedings thereunder are in violation of the United States Constitution naturally falls into three parts: first, the constitutionality of the charter provisions; second, the constitutionality of the ordinance; and third, the constitutionality of the proceedings thereunder. Of these in order.

### **I.**

**Section 28 of Article VIII of the Kansas City Charter does not violate the Constitution of the United States.**

The usual procedure for grading streets, avenues and public highways of every character is laid down in Section 3 of Article VIII of the charter (Trans. 30-34). This section provides that the cost of all grading shall be charged as a special tax on all lands on both sides of the highway graded. If the land is laid off into blocks, the assessment goes to the center of the block whether fronting on the highway or not (or to the alley only, if the council so prescribe by ordinance). If not laid off into blocks, then the assessment goes back one hundred fifty feet. The assessment is according to the value, exclusive of improvements (Trans. 33). A special assessment of the value is made by the City Assessor (Trans. 33).

Substantially the same procedure has been in force in Kansas City since 1889. Charter of Kansas City, 1889,

Art. IX, Sec. 5. Its validity had been thoroughly established.

*West v. Burke*, 286 Mo., 358, 228 S. W., 775;  
*Nichols v. Kansas City*, 291 Mo., 690, 237 S. W.,  
107.

Even where the assessments amounted to a very large proportion of the value of the abutting property.

*Nichols v. Kansas City*, 291 Mo., 690, 237 S. W.,  
107.

Apparently, however, this method had been found in some instances to throw too heavy a burden upon the property fronting on the improvement. Unlike the cost of paving, which is substantially the same wherever laid, the cost of grading differs tremendously and has less relation to the effect on immediately abutting property. In some cases, the cut or fill may be sufficient to leave such property practically worthless (Trans. 70).

To meet this situation, the present charter (adopted in 1908) added Section 28 of Article VIII, permitting the cost of grading in certain cases to be spread over a larger benefit district. Section 3, providing for ordinary grading of streets, remains in effect, and may be followed in the discretion of the council in grading any highway. Section 28 is an alternative procedure, to be followed when, in the opinion of the council, the cost warrants it. The determina-



tion of the council is made final on this question (Trans. 28). Section 28 (Trans. 27-30) provides in substance:

When, in grading any highway, a very large or unusual amount of filling in or cutting away is necessary, necessitating an expense so large as to impose too heavy a burden on the land situated in the benefit district limited in Section 3, the cost of grading may be charged as a special tax on lands benefited thereby in proportion to the benefits accruing to the several parcels, exclusive of improvements, and not exceeding the amount of said benefit, said benefits to be determined by the Board of Public Works as hereinafter provided, and the limits within which parcels of land are benefited shall be prescribed and determined by ordinance. The finding of the Council as to the amount of work and expense shall be conclusive.

The work shall be provided for by ordinance, and the City may provide that the City shall file a proceeding in the Circuit Court of Jackson County, Missouri, in the name of the City, against the respective owners of land chargeable under this section with the cost of the work. The City shall allege the passage and approval of the ordinance, the approximate cost of the work the limits of the benefit district prescribed by the ordinance, and the prayer of the petition shall be that the court find and determine the validity of the ordinance and the question whether or not the respective tracts in the benefit district shall be charged with the lien of such work as provided in the ordinance.

Service in such proceeding shall be governed by the provisions of Section 11 of Article XIII of the charter. The City shall have the right to offer evidence tending to prove the validity of the ordinance and of the proposed lien, and the property owners shall have the right to introduce evidence tending to show the invalidity of the ordinance and of the lien against the respective lots. The court shall determine whether or not the parcels of each defendant should be charged with the lien.

Trial shall be in accordance with the Constitution and laws of the state, and the court shall render judgment either validating the ordinance and lien against the lots in the benefit district or against such lots as are found legally chargeable, or may render judgment that the ordinance and lien are in whole or in part invalid.

An appeal may be taken within ten days.

If the ordinance be sustained, the City may make a contract for the work, and after the work is completed, the estimate of cost and the apportionment thereof against the parcels in the benefit district shall be made by the Board of Public Works according to the assessed value thereof, exclusive of improvements, with the assistance of the City Assessor as provided in Section 3, and all the provisions of Section 3 relating to the apportionment and the levy, issue and collection of tax bills as in grading proceedings, shall apply to tax bills issued hereunder, except as to the number of installments.

Nothing in this section shall affect any previous section, the intention of this section being to provide an independent and separate method of improvements made under the provisions hereof.

There can be no serious question, in view of the authorities, that this Section 28 is constitutional. It provides for an ordinance authorizing the grading and establishing a benefit district; for a hearing after notice on the validity of the ordinance; for the doing of the work and the determination of its cost; for the apportionment of that cost against the lands in the benefit district according to the assessed value thereof, a special assessment being authorized for the purpose.

The only possible attack that can be made upon the constitutionality of this section is the one made by defend-

ants in the District Court. It was there stated by them as follows:

“The method of apportionment provided for in Section 28 of Article VIII of the charter is fundamentally so unfair and unjust as to result in the taking of property without due process, in violation of the Fourteenth Amendment to the Federal Constitution.”

Apparently this attack is made upon the plan as a plan, and not simply in its application to the present proceedings. It is urged that in almost no conceivable case can an apportionment of cost over a benefit district according to the assessed valuation of the lands, be defensible; that necessarily lands abutting on or nearer to the improvement are more greatly benefited than lands farther away; that therefore the assessments must decrease as distance from the improvement increases, or the assessments will be void. Since, under the plan of apportionment according to value, the assessments cannot so decrease, but on the contrary may actually increase, it is said that the whole plan is arbitrary and unconstitutional.

The theoretical basis of special assessments and the practical considerations which prevent the attainment of absolute justice in the application of any definite rule or method, are too well understood to require restatement. Courts of last resort have again and again recognized the impossibility of theoretical exactness in these matters, and upheld plans only roughly approximating the acknowledged principle of apportionment according to benefits.

In *Falbrook Irrigation District v. Bradley*, 164 U. S., 112, 17 S. Ct., 56, this Court, at page 176 of the opinion,

uses the following language with reference to apportionment based upon assessed value:

“Assume that the only theory of these assessments for local improvements upon which they can stand is that they are imposed on account of the benefits received, and that no land ought in justice to be assessed for a greater sum than the benefits received by it; yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to demonstrations in geometry. Some means of arriving at this amount must be used, and the same method may be more or less accurate in different cases involving different facts. Some choice is to be made and where the fact of some benefit accruing to all lands has been legally found, can it be that the adoption of an ad valorem method of assessing the lands is to be held a violation of the Federal Constitution? It seems to us clearly not. It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received, which is open to the discretion of the state legislature, and with which this court ought to have nothing to do. The way of arriving at the amount may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem, and far from a case of taking property without due process of law.”

It is now settled beyond all possibility of doubt that the method of distributing cost provided for in Section 28. of Article VIII of the Charter of Kansas City—i. e. distribution in proportion to the assessed valuation of the respective tracts, exclusive of improvements, as fixed by the assessor for the purposes of the assessment proceeding—is a valid and constitutional method of apportionment.

- Embree v. Kansas City and Liberty Boulevard Road District*, 240 U. S., 242, 36 S. Ct. 317, affirming 257 Mo., 593;
- Fallbrook Irrigation District v. Bradley*, 164 U. S., 112, 17 S. Ct., 56;
- Hagar v. Reclamation District*, 111 U. S., 701, 4 S. Ct., 663;
- Houck v. Little River Drainage District*, 239 U. S., 254, 36 S. Ct., 58;
- Saxton National Bank v. Carswell*, 126 Mo., 436, 29 S. W., 279;
- Corrigan v. Kansas City*, 211 Mo., 608, 111 S. W., 115;
- West v. Burke*, 286 Mo., 358, 228 S. W., 775.

The theory that cost should be distributed over the district in exact proportion to the special benefits received by each parcel is recognized by the courts, but it is nevertheless frankly admitted that no method can do more than approach the goal and the courts therefore universally uphold all methods of distribution which tend, to a reasonable extent, to make the assessments proportional to the benefits.

Thus the cost may be distributed in proportion to frontage on the street improved.

- Ross v. Gates*, 183 Mo., 338, 81 S. W., 1109;
- French v. Barber Asphalt Paving Co.*, 181 U. S., 324, 21 S. Ct., 625.

Or in proportion to area.

- McGhee v. Walsh*, 249 Mo., 266, 155 S. W., 445;

*Heman v. Allen*, 156 Mo., 534, affirmed 181 U. S.  
402, 21 S. Ct., 645;  
*Houck v. Little River Drainage District*, 239 U. S.,  
254, 36 S. Ct., 58.

Or at a fixed sum per front foot.

*Wagner v. Baltimore*, 239 U. S., 207, 36 S. Ct., 66;  
*Wagner v. Leser*, 239 U. S., 207, 36 S. Ct., 66;  
*Parsons v. District of Columbia*, 170 U. S., 45, 18  
S. Ct., 521.

None of these methods of apportionment is ideal. All have flaws. The unconstitutionality of each method has often been urged upon the courts. In *French v. Barber Asphalt Paving Company*, 181 U. S., 324, 21 S. Ct., 625, it was strenuously argued that the front foot rule of assessment is invalid and violative of due process of law, because it takes no account of actual benefits. In *Tonawanda v. Lyon*, 181 U. S., 389, 21 S. Ct., 609, the front foot rule was objected to because it made no provision for an inquiry into the value of the abutting lots. In *Houck v. Little River Drainage District*, 239 U. S., 254, 36 S. Ct., 58, the fixed tax per acre was alleged to be unconstitutional because the lands in the district vary in value, and the level tax was assessed without regard to the relative value of the respective tracts and without regard to benefits. In *Corrigan v. Kansas City*, 211 Mo., 608, 111 S. W., 115, the court says (p. 631):

“Appellant’s sixth point is that the uniform tax of two and one-half mills on the dollar, as shown by the city assessment rolls, ignores the question of benefits, and assesses all the property alike in the face of the

obvious fact that all is not to the same degree benefited. That is the same argument that has been in the past urged with so much force to show that the front foot rule of assessment for street improvement was invalid. This Court has expressed its opinion too often on that subject to render further discussion of it necessary."

The conclusion of the whole matter is admirably summarized by the Supreme Court of Missouri in *Construction Co. v. Shovel Co.*, 211 Mo., 524, 531, 111 S. W., 86, as follows:

"It is within the power of the legislature to create special tax districts, and to charge the cost of a local improvement, in whole or in part, upon the property in said district, either according to valuation or superficial area or frontage. (*Webster v. Fargo*, 181 U. S., 394; *Prior v. Construction Co.*, 170 Mo., 439; *Asphalt Co. v. French*, 158 Mo., 534; *Spencer v. Merchant*, 125 U. S., 345; *Egyptian Levee Co. v. Hardin*, 27 Mo., 495)."

There can be no doubt, under the authorities, of the constitutionality of Section 28.

## II.

**Ordinance No. 21831, providing for the grading of Meyer Boulevard, does not violate the United States Constitution.**

This ordinance carries out exactly the terms of Section 28 of Article VIII of the charter, and cannot therefore, be unconstitutional, unless it be in one particular, namely, in fixing the benefit district. For present purposes, that is the only

thing done by the ordinance which represents independent decision or action. The question, then, reduces itself to this: Is the benefit district fixed by the ordinance of such a nature as to render the ordinance unconstitutional?

### A.

In determining this question, it must at all times be kept in mind that the question is not in the first instance a judicial one, but a legislative one. It is plain that no clear line can be drawn between public improvements—public in the sense that the entire municipality is interested therein to the exclusion of any particular locality, and local improvements—local in the sense that a particular locality is especially concerned. It is equally plain that no hard and fast rule can be laid down to determine exactly what extent of territory is specially concerned and exactly in what degree.

It has become firmly established that the primary duty of deciding these matters is placed by our form of government upon the legislative department, and that the decision of that department is conclusive, subject only to the limitation hereinafter mentioned. And this is true, as in all matters of legislation, without any notice to property owners or any hearing on the question whatsoever.

*Naylor v. Harrisonville*, 207 Mo., 341, 105 S. W., 1074;

*Heman v. Allen*, 156 Mo., 534, affirmed as

*Shumate v. Heman*, 181 U. S., 402, 21 S. Ct., 645;

*Williams v. Eggleston*, 170 U. S., 304, 18 S. Ct., 617;

*Nichols v. Kansas City*, 291 Mo., 690, 237 S. W.,



In *Spencer v. Merchant*, 125 U. S., 345, 8 S. Ct., 921, the court says (l. c. 357):

“The legislature itself determined what lands were benefited, and should be assessed. By this statute the legislature, in substance and effect, assumed that all the lands within the district defined by the statute of 1869 were benefited in a sum equal to the amount of the original assessment, the expense of levying it, and interest thereon; and determined that the lots upon which no part of that assessment had been paid, and which had therefore as yet borne no share of the burden, were benefited to the extent of a certain portion of this sum. That these lots as a whole had been benefited to this extent was conclusively settled by the legislature.”

Quoting further (l. c. 353):

“The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do so, and may settle both questions for itself; and when it does so, its action is necessarily conclusive and beyond review. Here an improvement has been ordered and made, the expense of which might justly have been imposed upon adjacent property benefited by the change. By the act of 1881, the legislature imposes the unpaid portion upon the property benefited which has thus far borne none of the burden. In so doing, it necessarily determines two things, viz., the amount to be realized, and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision must of course be final. We can see in the de-

termination reached possible sources of error and perhaps even of injustice, but we are not at liberty to say that the tax on the property covered by the law of 1881 was imposed without reference to special benefits. The legislature practically determined that the lands described in that act were peculiarly benefited by the improvement to a certain specified amount which constituted a just proportion of the whole cost and expense; and while it may be that the process by which the result was reached was not the best attainable, and some other might have been more accurate and just, we cannot for that reason question an enactment within the general legislative power. That power of taxation is unlimited, except that it must be exercised for public purposes."

#### B.

There is, however, one limitation to this legislative power: its exercise must not be so unreasonable as to be arbitrary. The legislative body is presumed to proceed upon investigation and to act with reference to the requirements of the public good. The presumption is that it creates a taxing district and charges the expense of an improvement upon that district, only when satisfied that the improvement is of special benefit to the property in the district and that the amount of such benefit will be in excess of the tax. So long as the legislative body does not act arbitrarily, this presumption will prevail.

It is not competent, therefore, for the courts to consider whether as an original proposition, the cost of grading Meyer Boulevard should be charged against a local district or paid by general taxation. The courts are not authorized to pass as in the first instance, upon the question

where the limits of the district should be established. They may not weigh the advantages and disadvantages of various rules of apportionment and declare the tax bills illegal because the cost was not distributed in accordance with the rule deemed by them to be the most equitable. The issue is merely as to whether the legislative and municipal authorities acted beyond the bounds of reason. As said in *Brougham v. Kansas City*, 263 Fed., 115, the judgment of the court as to the expediency or necessity of the action taken cannot be substituted for the judgment of the body delegated by law with the power and responsibility of acting with respect to such questions. The true rule is that unless there clearly appears to be an abuse of legislative discretion, the courts cannot interfere.

*Carson v. Sewer Commissioners*, 182 U. S., 398, 21 S. Ct., 860;

*Fallbrook Irrigation Co. v. Bradley*, 164 U. S., 112, 17 S. Ct., 56.

The question presented to the court, in view of these authorities, is not whether the grading of Meyer Boulevard is a public improvement or a local improvement, not whether the benefit district charged with its cost is the best district that could be fixed; but whether the action of the council in determining the grading to be a local improvement and in fixing the limits of the district, was arbitrary and hence an abuse of legislative discretion. Unless the record requires an affirmative answer to this question, the validity of the ordinance must be sustained.

## C.

**(a) The grading of Meyer Boulevard is an improvement of such a nature that its cost may lawfully be charged against a local benefit district.**

It is certainly the general, if not the universal, method prescribed in city charters for grading streets, avenues and highways, that the cost shall be levied against the property in a benefit district. Even the front foot rule really involves a benefit district, consisting of the abutting property within a certain distance of the highway. As already shown, the Kansas City charter provides that ordinary grading shall be paid for by a district abutting on the improvement and extending back approximately one hundred fifty feet. Certainly at this late day, no further citation of authorities is necessary to sustain the validity of this provision.

The present proceeding had for its object the grading of an avenue or highway, to-wit, Meyer Boulevard, and no sufficient reason has been suggested for excluding it from the terms "avenue or highway." Every avenue contains in addition to the paved roadway, a considerable amount of parking and space for trees and other embellishments. We know of no rule fixing the percentage of roadway or parking or limiting the width of parking or forbidding flowerbeds.

It was urged below that the boulevard partook much more of the nature of a park than of a highway and the District Judge in his opinion calls it a "super-boulevard" (Trans. 130) and states that it was conceived for the purpose of establishing an inspiring approach to Swope Park and incidentally as a thoroughfare (Trans. 128). But never-

theless, it is a highway, which is defined by Webster as a thoroughfare, and it is an avenue, which is defined as a broad street lined with trees. That it partakes largely of the nature of a park does not prevent it from being a local improvement. The very Swope Park to which it constitutes an approach is a local improvement for which assessments might have been levied against a benefit district.

In *Kansas City v. Bacon*, 147 Mo., 259, 48 S. W., 860, the court held that the entire cost incident to the condemnation of land for North Terrace Park, in Kansas City, could legally be assessed against a local benefit district. The Court says (l. c. 273):

“That the condemnation of land for a public park is for a public use, must be conceded; otherwise there is no foundation for the exercise of the right of eminent domain. The recent authorities are uniform. (*Kansas City v. Ward*, 134 Mo., 172; *County Court v. Griswold*, 58 Mo., 175; *Shoemaker v. U. S.*, 147 U. S., 297, and cases cited).

But a public park is not only a public use, but throughout the States of this Union, it is held to be a local improvement, conferring such benefits in the way of increased value to the land in the benefit district in which it is situated, as to justify special assessments against private property to pay the compensation for the land condemned for such park. The argument of the learned counsel for defendants, pressed to a logical conclusion, amounts to a denial of the right of the legislative body to define the benefit district. This court and the highest courts, Federal and State alike, have long ago repudiated the reasoning of appellants, and we see no reason for reversing decisions that have so long stood the test of judicial investigation, or for repeating the grounds upon which they are based.”

In *Kansas City v. Bacon*, 157 Mo., 450, 57 S. W., 1075, local assessments were sustained to pay for the cost of the establishment of Penn Valley Park in Kansas City.

In *French v. Barber Asphalt Paving Company*, 181 U. S., 324, 21 S. Ct., 625, we find the following:

“Whether the expense shall be paid out of the general treasury or be assessed upon abutting property or other property specially benefited \* \* \* is \* \* \* a question of legislative expediency.”

**(b) The benefit district was not fixed arbitrarily.**

Bearing in mind that exact equality of burden is an impossibility and hence unnecessary, and that the courts can only interfere when the legislative action is arbitrary and cannot substitute their own discretion or opinion for that of the legislative body, the courts have laid down certain general principles to govern their decisions in dealing with benefit districts.

In the first place, it has been definitely established that instances of individual injustice will not invalidate the legislative action in fixing the district. Proof that a particular assessment against a particular tract exceeds in amount the benefits accruing to that tract will not suffice to defeat the assessment.

*Barber Asphalt Paving Co. v. French*, 158 Mo., 534, 58 S. W., 934.

The individual tax may even exceed the value of the land against which it is assessed.

*Chadwick v. Kelley*, 187 U. S., 540, 23 S. Ct., 175.

The topography of the benefit district may be such that with respect to certain portions thereof there may be no possibility of benefit from the improvement, and yet the assessments against these portions will be enforceable.

*McGhee v. Walsh*, 249 Mo., 266, 155 S. W., 445;  
*Heman v. Schulte*, 166 Mo. 409, 66 S. W., 163.

Indeed, the fact that the improvement damaged, rather than benefited, certain of the assessed property is immaterial.

*Keith, v. Bingham*, 100 Mo. 300, 13 S. W., 89.

The question is, not whether the individual assessment exceeds the individual benefit to the particular lot, but whether the total assessment exceeds the total benefit to the district.

Moreover, and in the second place, even this excess of total assessment over total benefit must be gross—so far out of all reasonable proportion as to be entirely indefensible. Reasonable latitude must be allowed because exactness is impossible of attainment.

In *Louisville & Nashville R. R. v. Barber Asphalt Paving Company*, 197 U. S. 430, 25 S. Ct. 466, the Supreme Court, at page 433 of the opinion, uses the following language in upholding a paving tax levied in proportion to the area of the lots in the benefit district:

“There is a look of logic when it is said that special assessments are founded on special benefits and that a

law which makes it possible to assess beyond the amount of the special benefit attempts to rise above its source. But that mode of argument assumes an exactness in the premises which does not exist. The foundation of this familiar form of taxation is a question of theory. The amount of benefit which an improvement will confer upon particular land, indeed whether it is a benefit at all, is a matter of forecast and estimate. In its general aspects at least it is peculiarly a thing to be decided by those who make the law. \* \* \* A statute like the present manifestly might lead to the assessment of a particular lot for a sum larger than the value of the benefits to that lot. The whole cost of the improvement is distributed in proportion to area, and a particular area might receive no benefits at all, at least if its present and probable use be taken into account. If that possibility does not invalidate the act, it would be surprising if the corresponding fact should invalidate an assessment. Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things. And that has been the implication of the cases. *Davidson v. New Orleans*, 96 U. S. 97, 106; *Mattingly v. District of Columbia*, 97 U. S. 687, 692; *Parsons v. District of Columbia*, 170 U. S. 45, 52, 55; *Detroit v. Parker*, 181 U. S. 399, 400; *Chadwick v. Kelly*, 187 U. S. 540, 544."

The court below apparently put its decision upon the finding that the total tax bills unreasonably exceed any possible benefit to the total benefit district. We will discuss the propriety of this finding later. Before doing so, the action of the city authorities from a legislative standpoint should be considered.

Swope Park had previously been acquired. The land



for Meyer Boulevard had been condemned and the grade established. The next step was the actual work of grading.

The proper boards and the council determined that the cost would be too great for apportionment over the usual benefit district, and that, therefore, the larger benefit district provided for in Section 28 should be established. The charter makes this decision conclusive, and apparently the district court approved of it (Trans., 131). The council fixed the limits of such district by ordinance, under the recommendation of the Park Board.

In view of the presumption in favor of such action and of the testimony introduced on the point, it seems utterly incomprehensible to us that this benefit district could be held arbitrary. The adverse decision of the district court can be accounted for in but one way—that the court erred in admitting and gave improper and undue weight to the assessments of the property for general taxation. That will be discussed later. At this time, we desire simply to call attention to the considerations which determined the action of the council in fixing the district.

W. H. Dunn, Superintendent of Parks of Kansas City, connected with the Park Department for twenty-two years, testified that the boulevard was laid out through unplatted, acreage property extending from 63rd Street on the north to 67th Street on the south. South of 67th Street, the land had been platted into small ownerships. North of 63rd Street, much the same condition existed. Acreage property can more feasibly be made to conform to the improvement than property in small subdivisions and ownerships. Grading a boulevard is customarily a benefit to the property adjacent to it and on adjacent streets connected with it. A

boulevard like this could not be put through that class of undivided property without putting it on the market and giving benefit to it. Meyer Boulevard constitutes of course an important artery in the whole park system. It was for this reason that the benefit district was enlarged beyond the district ordinarily assessed with the cost of grading. It is generally true that abutting property receives more special benefits than property at a distance (Trans., 102-105).

Charles C. Craver, a real estate man for twenty years, member of the Park Board at the time of the proceedings in question, testified that the first thing considered was the burden of placing the whole cost on abutting property. So much of the property was below grade and affected adversely by the grade, that it was thought best to establish a larger benefit district. The judgment was largely influenced by the measure of benefit to adjacent property and how far that benefit would extend. A benefit district is largely a matter of compromise. In this instance, 63rd Street was considered a reasonable northern boundary because traffic originating north of 63rd Street would naturally flow north, and 63rd Street was an open and traveled street at that time. 67th Street was also open and though not fully improved, was in contemplation as a traffic way. South of 67th Street, the property was platted into small lots, sold on the installment plan, with small houses occupied by poorer people. The nature of the country south of 67th Street was such that it could not be improved so as to get full benefit of the improvement, and it was therefore thought unfair to extend the district farther. A compromise was finally reached, and the district fixed as shown. The judgment of the board at that time is still my judgment (Trans., 105-107).

He further testified that it would be impracticable for people living south of 67th Street to go direct to Meyer Boulevard because of the grade leading up to it from the south. Some of the property on the south is as much as fifteen or eighteen feet below grade. Furthermore, it is a class of property served more by street cars than by boulevards. The grading of the boulevard through open, unimproved property affects the property very favorably in value. The benefit is not confined to the abutting property, but extends back a considerable distance depending upon the particular circumstances. The property both north and south of the boulevard in the district increased in value by the grading, especially that on the north, which is above grade and of a better class. The benefit is greater on unimproved property than on platted property. (Trans. 107.)

Mr. Craver also testified, in answer to questions by the court, that the fixing of the benefit district was a matter of compromise. He explained what he meant by compromise: that interested people appeared before the Board and presented their ideas; that the Board heard them, went over the matter and then reconciled the divergent ideas of the board (Trans. 112-113).

Cusil Lechtman, a member of the Park Board at the time of the proceedings in question, testified that in arriving at the limits of the district he considered the extent of the direct as distinguished from the consequential benefits. Because 63rd Street on the north was already quite a thoroughfare and a street car line was contemplated on 67th Street, because the land north of 63rd Street was platted and that south of 67th Street laid out into small lots, and because the land between the two streets was unplatted and had no im-

provements, he fixed the direct benefit between the two streets. The improvement no doubt benefited the whole city, but the greatest benefit is to close-by property. It causes an immediate benefit to nearby property (Trans. 113).

It is difficult to conceive that even a court could take a fairer attitude toward a difficult question, give a clearer consideration to the circumstances and necessities of the situation, or reach a more just result. We earnestly request that the testimony of the witnesses Dunn, Craver and Lechtman be carefully considered by the court. It is comparatively easy to point out theoretical weak spots in the district as fixed, but we challenge all objectors to offer any practical limits that will not involve more glaring defects than the limits established by the council. The district has been held to be unreasonable and arbitrary; but the pleadings, record and opinion of the lower court will be read in vain to find whether it is unreasonably small or unreasonably large, and what, if any, definite parcels should have been included or excluded to make it reasonable.

The allegations of the bill regarding the unreasonableness of the district, charge that land on the north not benefited was included, and land on the east and south benefited was excluded (Trans., 13); that the district was too small in view of the character of the improvement (Trans., 13); and that the land north of the boulevard is more than double the land south, whereas it is an obvious fact that owners and occupants of land south will have use of the boulevard while those north will have practically none (Trans., 13-14).

In support of these allegations, the complainants introduced the opinions of two real estate dealers, Garrett Elli-

son and H. V. Jones. Mr. Ellison testified that in his opinion Tracts 14 and 15 received a slight local benefit, but only a very small one. The property would have brought very little, if any, more on the market after than before the grading. Much the same was true of Tracts 2, 3, 8 and 11. Tracts 2 and 3 may have sustained an actual detriment. The greater part of the benefit from the grading was received by the property abutting on the boulevard, except that considerably below grade. Next in the matter of benefit would come the land south, next the property north. The nearer the boulevard, the greater the benefit as a general rule (Trans., 67-73).

Mr. Jones testified that Swope Park received a special benefit, the boulevard being a connection between the Park and the city. The property south of the boulevard received considerable of the special benefit. Tracts 14 and 15 received very little, if any, benefit; Tract 11, very remote benefit; Tract 2, none; Tract 3, much the same, except that the south end did receive some benefit, disappearing toward the north; Tract 8, very small benefit. It is very difficult to state the exact amount of benefit in dollars and cents, but it is far less than the amount of tax.

He further testified that the 150 feet just south of 63rd Street was not increased in value, whereas the 150 feet fronting on the boulevard was enhanced in value. The special benefits extended south as far, at least, as 75th Street. Both north and south, the benefit decreases as the distance from the boulevard increases. In some instances, there is a tendency for the best residences to recede from the boulevards. All property in the immediate neighborhood of all these boulevard improvements has been in most

instances specially benefited by the improvements (Trans., 82-86).

Mr. Kelly Brent, called on behalf of the appellants, testified that he was familiar with the character of the benefit district and with the character of the property north and south of the district and that, in his opinion, the district as fixed, was a reasonable one upon which to assess the cost of the improvement. He emphasized the fact that all of the land within the benefit district was acre property, unplatted and undeveloped, and that the boulevard would be a great benefit to it in opening it up and putting it on the market. He also brought out the fact that the property south of 67th Street had been platted into small tracts and developed in such a way that it would not be benefited materially by the opening of the boulevard. He stated that the property north of 63rd Street had been platted into relatively large tracts and built up for residence purposes and that the character of this property had been more or less fixed by the existing improvements and would not be benefited by the boulevard as much as the property between 63rd Street and 67th Street. Mr. Brent further testified that grading Meyer Boulevard damaged some of the dwelling property, inasmuch as over 50% of the property abutting on the boulevard was below the grade of the boulevard. He stated that the property on 65th Street would be as much, if not more, benefited by the grading than the property immediately abutting on the boulevard (Trans., 114-116).

Mr. John A. Moore, called as a witness on behalf of appellants, testified that he had had thirty-five years' experience in the platting and selling of residence property

in Kansas City, Missouri, and that he was familiar with the real estate values in the benefit district in question. He stated that, in his opinion, the district fixed by the ordinance for the grading of Meyer Boulevard was a reasonable one, for the reason that the property included within the district, being unplatted and undeveloped property, was susceptible of a better improvement than property already built up. The property south of 67th had been platted into small lots and built up with small cottages and its character had thereby been established as a low class district and the boulevard would not materially improve it. The property north of 63rd Street had been platted and improved and, therefore, the boulevard would not materially affect it. He stated that it was practically impossible to change a neighborhood once built up and that he had observed that boulevards constructed through poor neighborhoods did not have the effect of changing the character of the district and poor buildings continued to remain on the boulevard. If, however, a boulevard runs through or near a large vacant unplatted tract, it makes possible a development of the tract on a large scale and very great benefits result. Mr. Moore also stated that while, as a rule, the development of a boulevard more favorably affects directly abutting property, this is not always the case and that with regard to this particular improvement, a considerable amount of the abutting property was practically destroyed in value because of the fact that so much of the abutting property was very much below the grade of the boulevard (Trans., 116-117).

It is not apparent why the testimony of the witnesses Ellison and Jones should prevail over that of witnesses Brent and Moore. The testimony of all is opinion merely,



based upon their own personal ideas of real estate values, unconsciously colored perhaps by the natural leaning of experts toward the side that calls them. Properly enough, they focus attention on the considerations most favorable to that side and minimize those less favorable.

It is still less apparent why this testimony should be accepted as overthrowing the well-considered judgment of the legislative body charged with the duty of determining a practical benefit district for the purpose of grading this boulevard. Not one of these witnesses denied that the improvement was a special benefit to the district as a whole; or that the benefit to the district as a whole was less than the total assessment therefor. Not one affirmed that a single ground upon which the council acted in limiting the district was not well founded and entitled to weight; or that these grounds were not, taken together, ample to justify the district as fixed.

Giving this testimony its utmost weight, it tends to show that in the opinion of witnesses Ellison and Jones; first, the city as a whole derived a large benefit from the improvement; second, Swope Park received special benefit; third, Tracts 8, 11, 14 and 15 received very little special benefit, and Tracts 2 and 3 practically none; and fourth, the lands south of 67th Street to 75th Street were specifically benefited. That is everything, so far as the benefit district is concerned. If the validity of assessments for public improvements is to depend upon the opinion of real estate dealers upon values and increases of value, then no proceedings for such purpose can withstand attack.

Of course, the city at large derived a benefit from the



improvement. As said in *Kansas City v. Bacon*, 147 Mo. 259, 273, above cited: "That the condemnation of land for a public park is for a public use, must be conceded; otherwise there is no foundation for the exercise of the right of eminent domain."

Where the charter, as in the present section, leaves to the city authorities the determination of the question as to whether any part of the cost shall be paid by the city, the decision of the city authorities is conclusive, and not subject to review.

*Kansas City v. Ward*, 134 Mo., 172, 35 S. W., 600;  
*Bauman v. Ross*, 167 U. S., 548, 17 S. Ct., 966;  
*French v. Barber Asphalt Paving Company*, 181  
 U. S., 324, 21 S. Ct. 625;  
*Houck v. Little River Drainage District*, 239 U. S.,  
 254, 36 S. Ct., 58;  
*Kansas City v. Bacon*, 147 Mo., 259, 48 S. W., 860.

It may be, too, that Swope Park received some benefit. Whether the park should bear any part of the cost is conclusively for the determination of the council.

*Corrigan v. Kansas City*, 211 Mo., 608, 11 S. W.  
 115;  
*Kansas City v. Bacon*, 147 Mo., 259, 48 S. W., 860.

Possibly lands south of 67th Street might justifiably have been included. It is well settled that the circumstance that property outside of the benefit district is bene-

fited by the improvement does not make the district as established unreasonable.

*Kansas City Grading Co. v. Holden*, 107 Mo., 305,  
17 S. W., 798.

And as we have already shown, the inclusion of particular tracts that are little benefited, or not benefited at all, or actually damaged, will not defeat the legislative action.

The presumption is that the district as established is reasonable.

*Mullins v. Cemetery Association*, 268 Mo., 691, 187  
S. W., 1169;  
*Northern Pacific R. R. v. Seattle*, 46 Wash., 674,  
91 Pac., 244.

It is not possible that this presumption can be overcome by such testimony as this. Nor can there be found in the record a single statement or fact supporting the conclusion of the lower court that the total tax bills unreasonably exceed the benefit to the total benefit district. There is a complete failure of evidence in this matter.

The contention that the district is unreasonable and arbitrary because more land is included north of the boulevard than south of it is entitled to no weight whatsoever. The power to fix the district must of necessity include the power to determine how far on either side the benefit extends. Whatever inequalities may result from the establish-

ment of a district according to the judgment of the council as to the property benefited, would be infinitely increased in most instances should the charter require that the district must extend an equal distance on each side of the improvement.

As a matter of reason and common sense, the mere irregularity of a benefit district cannot be a ground for holding it arbitrary. Indeed, its regularity might well be considered a more logical ground for so holding, since it is doubtless very rarely that special benefits accurately follow the lines of the compass and the square. As a matter of authority, districts much more irregular than the present have been sustained by the courts.

*Construction Co. v. Shovel Co.*, 211 Mo., 524, 111 S. W., 86, sustains an irregular district, extending 700 feet from the improvement in one direction, and only 35 feet in another.

In *Voris v. Pittsburgh Plate Glass Co.*, 163 Ind., 599, 70 N. E., 249 and in *Cleveland Ry. Co. v. Porter*, 210 U. S., 177, 28 S. Ct., 647, a statute of Indiana, known as the Barrett Law, is held to be constitutional. That statute fixes the cost of paving in the first instance upon the abutting property extending back from the street to a distance of 50 feet. The assessment proceedings are had with reference merely to this 50-foot strip. The published notice to property owners describes merely the 50-foot strip. The statute then provides that if the respective lots in this district are sold to satisfy the tax bills issued against them, and prove insufficient in amount, the land immediately behind the lots

sold, back to a distance of 150 feet from the street, shall be subject to the lien of the unpaid balance of the tax bills. As a result, the boundary of the benefit district finally fixed may be an irregular line, jumping alternately back and forth from points 50 and 150 feet from the street.

In *Spencer v. Merchant*, 125 U. S., 345, 8 S. Ct., 921, and other cases sustaining reassessment statutes, the benefit district is necessarily irregular, since it consists of only those tracts in the original benefit district whose assessments had not been paid. In such a case the tracts in the district fixed by the reassessment law may not even be contiguous.

The absurdity of the contention cannot be better illustrated than by a reference to the actual result in the present proceedings. Here is a broad, open, unplatted area extending from 63rd to 67th Streets; a boulevard is to be graded through this area; if it is located in the mathematical center from north to south, the entire tract may, under the contention, be said to be benefited; if it is placed on a varying line averaging five hundred or six hundred feet south of the center, the entire tract may not, under the contention, be said to be benefited. And this without any consideration of the topography or development of the area and its surroundings.

In our opinion, after all the evidence is considered, the court cannot itself fix a more reasonable district than that fixed by the council. But even if it could suggest certain proper amendments, there is still no ground for holding the

district as fixed invalid. As is said in *Louisville & Nashville R. R. v. Barber Asphalt Paving Co.*, 197 U. S., 430, 435:

"We are not called on to say that we think the assessment fair. But we are compelled to declare that it does not go beyond the bounds set by the 14th Amendment of the Constitution of the United States."

**(c) The contention that the benefit district is illegal for the reason that a different, and much larger, district was assessed with the cost of condemning land for the boulevard has no merit.**

The condemnation and grading proceedings are entirely separate, and represent distinct improvements of different character. This argument, if sound, would mean that the cost of grading or even of paving a street could not be assessed upon the abutting property, but must be spread over the same district as that established in the condemnation proceeding.

In *Houck v. Little River Drainage District*, 239 U. S., 254, 36 S. Ct., 58, a statute is upheld which makes provision for two separate benefit districts for the same improvement—one to pay for the preliminary cost of determining whether or not the proposed work shall be done, the other to be assessed with the actual cost of the completed work. If there may be separate districts for the same improvement, the existence of separate districts for separate improvements should not cause doubt as to the legality of either district.

As a matter of fact, the condemnation proceedings in which Meyer Boulevard was established included many

blocks of boulevard not included in the grading proceedings and involved lands in three distinct park districts (Trans., 40-45).

In connection with the contention that the cost of this improvement should have been distributed over a much larger district, it is important to note that in the usual grading proceeding under the Kansas City Charter, cost is charged only upon lands back 150 feet from the graded street. Section 28 of Article VIII provides that if the fills and cuts are of such magnitude as to impose too heavy a burden upon this 150 foot strip, the Council may make provision for an enlarged district. It seems evident that a district *somewhat deeper than 150 feet* is contemplated. There is no warrant whatsoever for the assumption that only a district many times larger than the usual one—perhaps several miles in width—is authorized. The ordinary construction would be that the enlarged district contemplated in Section 28 of Article VIII is a district somewhat commensurate with the benefit district in the usual grading proceeding. Certainly there is no ground for holding that it must be either 150 feet or a whole Park District, and that the council is acting arbitrarily if it fix limits between the two.

Appellants further contend, with regard to the reasonableness of the benefit district, that this question was adjudicated in the proceedings filed in the Circuit Court of Jackson County as provided in the charter and ordinance and is therefore not now open for consideration. This will be discussed under a separate heading. (*Infra* VII).

(d) That property not abutting on the improvement cannot as a physical fact be benefited as much as property abutting thereon is both untrue and immaterial.

This contention, while apparently aimed at the fairness of this particular district, is in truth another form of attack on the general method of apportioning benefits according to assessed valuation. In every case where a benefit district is established and the assessment made according to value, no account is taken of distance from the improvement. This contention is disposed of in Point I, *supra*.

In *Embree v. Kansas City and Liberty Boulevard Road District*, 240 U. S., 242, 36 S. Ct., 317, property for a distance of one mile on each side of the boulevard is taxed in the same proportion, in accordance with the assessed valuation of the respective tracts. It would seem therefore that a district extending only three blocks from the boulevard could be charged according to a uniform standard throughout.

In *Kansas City v. Bacon*, 147 Mo., 259, 48 S. W., 860, the cost of the proceeding was spread over an entire park district, in proportion to the assessed valuation of the respective tracts. The court in that case did not require a graduated scale of apportionment though the benefit district was many times larger than the district in the present proceeding.

*Kansas City v. Bacon*, 157 Mo., 450, 57 S. W., 1075, conclusively settles the point against complainants' contention. It resulted in that case that certain lots very near the im-

provement were assessed in sums which amounted to \$2.00 per front foot. Complainant's lots, a mile or more away, was taxed \$50 per front foot. The court said at page 474 of the opinion:

"In connection with this point is argued, what is claimed to be hardship and manifest inequality of the assessment. We are given as a conclusive illustration, the assessment of \$2 per front foot on a lot very near the park, and \$50 a front foot on appellant's property a mile or more away. That inequality is not so self-evident that it may be so declared as a matter of law. Two dollars a front foot on a lot in an unimproved and sparsely settled district remote from the center of trade might be in fact a greater rate *ad valorem* than fifty dollars a front foot, on a business lot in the heart of the traffic."

The legislature may provide for any reasonable method of apportionment of cost. If the method selected be a reasonable one, the legislative determination is not subject to review.

*Walston v. Nevin*, 128 U. S., 578, 9 S. Ct., 192;  
*Embree v. Kansas City and Liberty Boulevard  
 Road District*, 240 U. S., 242, 36 S. Ct., 317;  
*Spencer v. Merchant*, 125 U. S., 345, 8 S. Ct., 921;  
*Bauman v. Ross*, 167 U. S., 548, 17 S. Ct., 966;  
*French v. Barber Asphalt Paving Co.*, 181 U. S.,  
 324, 21 S. Ct., 625;  
*Houck v. Little River Drainage District*, 239 U. S.,  
 254, 36 S. Ct., 58.

Moreover, the assertion of fact is not, as stated, "above dispute." It is not a physical fact that property at a



distance cannot and does not receive as much benefit as abutting property. There are many other facts, such as the nature of the district, its topography, the extent of cuts and fills, that must enter into the question. Complainants' witness Ellison testified that in some cases the value of abutting property might be entirely taken away (Trans. 70). Their witness Jones testified that in certain instances the best residences have a tendency to recede from the boulevards (Trans. 85). Can it be said that the council acted arbitrarily in finding that this was a case where, taking all these matters (and others) into consideration, a benefit district extending from 63rd to 67th Street was the best practical district? Was such action in the fact of "a physical fact, beyond dispute?"

Clearly no such showing has been made as to authorize the court, whose sole province is to determine, not the reasonableness of the district, but the reasonableness of the action of the council in fixing it, to hold the ordinance unconstitutional because the district is an arbitrary exercise of legislative power.

### III.

**The proceedings subsequent to the ordinance do not violate the Constitution of the United States.**

Except for the provisions relative to the suit in the Circuit Court, the proceedings subsequent to the ordinance follow almost exactly the proceedings provided in Section 3 of Article VIII for ordinary grading. Indeed, Section 3 is referred to in Section 28 as establishing the necessary steps in making and paying for the grading. The only at-

tack made on these proceedings, except that on the Circuit Court suit which is discussed separately (Point VI, *infra*), is the contention that the assessment of values was without notice or hearing, was about four times the assessment for general taxes, and was arbitrary, unjust and excessive. Of these in order.

(1) The extent of the notice and hearing necessary in special assessment proceedings varies according to the nature of the action being taken. In general, it has been established that as to matters determined by the legislative body, no notice or hearing is necessary; as to delegated administrative matters, no notice or hearing is necessary; as to matters to be determined by courts, or officers or boards acting judicially, a hearing at some stage is essential.

*Parsons v. District of Columbia*, 170 U. S., 45, 18 S. Ct., 521;

*Hagar v. Reclamation District*, 111 U. S., 701, 4 S. Ct., 663;

*Voigt v. Detroit*, 184 U. S., 115, 22 S. Ct., 337.

Where cost is apportioned according to assessed valuation as provided in Sections 28 and 3, it may be that the action of the assessor in fixing the values is judicial. If so, the owners, at some point, are entitled to be heard on the question. Sections 28 and 3 do not in themselves provide for such hearing. Section 24 of Art. VIII provides, however, that tax bills issued under these proceedings are collectible only by action at law, after service duly had. The section further provides:

"That nothing in this section shall be so construed

as to prevent any defendant from pleading and proving in reduction of any bill any mistake or error in the amount thereof."

Does this section provide a sufficient hearing upon the question of assessment?

Notice and opportunity to be heard at every stage of the assessment proceedings are not required by due process of law.

*Voight v. Detroit*, 184 U. S., 115, 22 S. Ct., 337;

*Wight v. Davidson*, 181 U. S., 371, 21 S. Ct., 616;

*Pittsburg R. R. v. Board of Public Works*, 172 U. S., 32, 19 S. Ct., 90;

*In re Amsterdam*, 126 N. Y., 158, 27 N. E., 272.

Thus, if opportunity for a hearing is given at some later stage, no hearing need be had before the board or other body determining the benefits or fixing the valuation of the tracts for the purposes of the proceeding.

*Walston v. Nevin*, 128 U. S., 578, 9 S. Ct. 192;

*Embree v. Kansas City and Liberty Boulevard Road District*, 240 U. S., 242, 36 S. Ct. 317;

*Winona & St. Paul Land Co. v. Minnesota*, 159 U. S., 526, 16 S. Ct., 83;

*St. Louis v. Richeson*, 76 Mo., 470.

An opportunity to file objections and to be heard thereon after the special taxes have been levied satisfies due process, although there be no other or prior notice.

*In re Amsterdam*, 126 N. Y., 158, 27 N. E., 272.

Similarly, a right of appeal from assessments, made without notice or hearing makes the proceeding constitutional.

*King v. Portland*, 184 U. S., 61, 22 S. Ct., 290.

If, therefore, the tax bills issued can be enforced only by suit, had after due service, and if the property owner can in such suit be heard upon the question of the assessment, then the requirements of due process are thereby met so far as the assessment is concerned. Opportunity to be heard in the collection proceeding satisfies the Fourteenth Amendment.

Under Section 24, the tax bills in controversy can be enforced only by suit, had after due service, and the property owner can in such suit be heard upon the question of the assessment. The right to such hearing is expressly given in the proviso quoted.

*Embree v. Kansas City and Liberty Boulevard Road District*, 240 U. S., 242, 36 S. Ct., 317;  
*Neil v. Ridge*, 220 Mo., 233, 119 S. W., 619;  
*First National Bank v. Nelson*, 64 Mo., 418;  
*Nichols v. Kansas City*, 291 Mo., 690, 237 S. W., 107;

In *Saxton National Bank v. Carswell*, 126 Mo., 436, 29 S. W., 279, an identical provision in the Chapter of the Revised Statutes governing cities of the second class in Missouri, was held to mean that in the suit on the tax bill the owner may set up any defense he has, including the defense

that his land was over-valued by the city assessor, and a hearing may then be had on such question.

As pointed out by the court in *St. Louis v. Richeson*, 76 Mo., 470, this must be the sense of a provision, without more, that the tax bill can be collected only by suit.

There being, therefore, an opportunity for the owners to be heard in the suits on the tax bills, the procedure prescribed is due process. As the court says in *Winona & St. P. Land Co. v. Minnesota*, 159 U. S., 526, 16 S. Ct., 83:

“Questions of this kind have been repeatedly before this court, and the rule in respect thereto often declared. That rule is that a law authorizing the imposition of a tax or assessment upon property according to its value does not infringe that provision of the 14th Amendment to the Constitution which declares that no state shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity or amount of it either before that amount is determined, or in subsequent proceedings for its collection.”

Such is unquestionably the settled law.

*Weyerhaeuser v. Minnesota*, 176 U. S., 550, 20 S. Ct., 485;

*Kentucky Railroad Tax Cases*, 115 U. S., 321, 6 S. Ct., 57;

*Hagar v. Reclamation District*, 111 U. S., 701, 4 S. Ct., 663;

*Wells Fargo & Co. v. Nevada*, 248 U. S., 165, 39 S. Ct., 62;

*Kansas City v. Hwing*, 87 Mo., 203;

*Barnes v. Pikey*, 269 Mo., 398, 196, S. W., 883;

And cases hereinbefore cited under this Point.

(2) The allegation that the special valuation of complainants' property for the purposes of this proceeding is four times the assessment of the same property for general taxes is utterly irrelevant and immaterial to the question here involved. This for two reasons: first, because it makes absolutely no difference in the amount of the benefits levied against the land; and second, because the fact, if established, does not in any way indicate a wrongful valuation.

Under the provisions of the charter, the valuation of the land is important only as a measure of distribution among the various tracts charged with the benefits. It is the relative valuation only that matters; the absolute value is entirely unimportant. If the valuation of every tract in the district be divided in half, the distribution remains the same. If the valuation be multiplied by four, it makes not a penny difference, so long as each tract is treated alike. That complainants' property was quadrupled in value does not increase their liability unless at the same time other property in the district was not quadrupled. This is a mathematical certainty.

Moreover, there is no evidence whatsoever that four times the assessment of property for general taxes is not a fair estimate of its real value. We know of no ground upon which the assessment for general taxes, unless made by the owner himself, is admissible for any purpose or is competent to establish real value. This is considered later, under Point IV, *infra*.

(3) As to the allegation that the valuation was arbitrary, unjust and excessive, there is a complete failure of evidence. No witness attempted to put a value upon any

tract in the district and there is not a word in the record to suggest that one tract was valued too highly as compared with another. We have shown under (2) above that excessive valuation, if not discriminatory, does complainants no harm and can avail them nothing. Unjust valuation, unless discriminatory, has no meaning in these proceedings. Arbitrary valuation, in order to avoid the assessment, must be arbitrarily discriminatory as between tracts. There is absolutely no evidence of discrimination or indeed of the value of any particular tracts whatever, or of the district as a whole. The lower court was manifestly wrong in its findings as to value.

#### IV.

**There was no testimony of excessive valuation, or of discrimination in valuation, or of any value at all.**

The complainants offered no testimony as to the actual value of any tracts in the benefit district either before or after the grading. None was offered by the defendants. Yet the lower court found that "these tax bills amount to more than one-third of the actual value and that the benefit to complainants' property, if any, is negligible." (Trans. 131). The decision of the court setting aside the tax bills is based largely on this finding. The opinion shows that the court in reaching that result acted upon testimony wrongfully admitted in evidence over defendants' objection, entirely incompetent and of no probative value whatever—the assessments for general taxation for the years 1915, 1916 and 1917. The admission of the assessments was error

and the conclusions based thereon are not supported by any competent testimony.

No case has been found where an assessment for taxation made solely by public officials has been held competent to establish value, either against the owner or the municipality. The universal rule is to the contrary.

22 Corpus Juris, 178, Sec. 122;

13 Ency. of Ev. 454.

In condemnation proceedings it has been consistently held that assessments, unless the value is fixed by the owner, are not competent even against the city to show real value.

*Girard Trust Co. v. Philadelphia*, 248 Pa. 179;  
93, Atl. 947.

*Wayland v. Seattle*, 96 Wash. 344, 165 Pac., 113;

*Marine Coal Co. v. Pittsburg M. & Y. R. R. Co.*,  
246 Pa. 478, 92 Atl., 688;

*Hildreth v. City of Longmont*, 47 Colo. 79, 105  
Pac., 107;

*Baltimore v. Carol*, 128 Md. 68, 96 Atl., 1073;

*Suffolk & C. Ry. Co. v. West End Land Co.*, 137  
N. C. 330, 49 S. E., 350;

In this last case, the Court said:

“Where the mere listing of the land is the act sought to be shown, the tax lists are admissible because the lister is the actor; but the rule is essentially different where the value of the land is sought to



be proved thereby, because the valuation is the act of the assessors, and therefore *res inter alios acta* as between the parties to this proceeding. The tax lists were not competent evidence to show the value of the land, as the assessors were not witnesses in the case, sworn and subject to cross-examination in the presence of the jury. The tax valuation being placed on the land by the tax assessors without the intervention of the land owner, no inference that it is a correct valuation can be drawn from his failure to answer that the valuation is too low. Such valuation was *res inter alios acta* and is not competent against the plaintiff."

The rule has been followed in other proceedings.

- Fort Collins Dev. Co. v. France*, 41 Col. 512, 92 Pac., 953;  
*Savannah Ry. v. Buford*, 106 Ala. 303, 17 So., 395;  
*St. Louis, I. M. & S. Ry. Co. v. Magness*, 93 Ark. 46, 123 S. W., 786;  
*Denver & R. G. R. Co. v. Heckman*, 45 Colo. 470, 101 Pac., 976;  
*Kelly v. People's Natl. F. I. Co.*, 262 Ill., 158, 104 N. E., 188;  
*Martin v. N. Y. & N. E. Ry. Co.*, 62 Conn. 331, 25 Atl., 239;  
*Hamilton v. Seaboard Air Line*, 150 N. C., 193, 63 S. E., 730.

In the case last cited, the court said:

"Under our revenue law, the owner of land does not, in listing it for taxation, fix any value upon it. This is done by the assessors either from actual view or from the best information that they can practically obtain, according to its true valuation in money. We cannot see therefore, how the fact that the witness listed the land for taxation has any tendency to show

its value or his opinion in that respect. The valuation is *res inter alios acta*. The objection is not that tax lists are not public records, but in the valuation of the land for taxation, the owner is not consulted, he takes no part. The valuation is but the opinion, upon oath it is true, of these assessors for the purpose of taxation. It is well understood that it is the custom of the assessors to fix a uniform rather than an actual valuation."

The lower court itself, while admitting and considering these assessments, recognizes their entire unreliability. The court says:

"Now, while property of this nature is not assessed at full valuation for general purposes, no one will contend that it is assessed at practically only one-fifth of its actual value. Thirty or forty per cent on city property would be the lowest acceptable figure." (Trans. 131).

By what right can the court, after admitting incompetent assessments, determine without evidence—by judicial notice solely—that such assessments are not at twenty per cent, but are at thirty or forty per cent? If this is a matter for judicial notice, we do not know upon what ground it is so to be held. It may be well understood, as said, in one of the cases, that such assessments are unreliable as showing the real or market value of property; it is certainly a notorious fact, as said in another case, that the assessment of real property made by county assessors affords no criterion whatever as to its value. But if they are unreliable and afford no criterion of value, then the court has no legitimate basis for holding, without evidence, that they are thirty per cent or forty per cent and not twenty per cent of the actual value.

The court is in error in saying that no one will contend that the assessment for general taxation is only twenty per cent, just as the court is wrong in assuming that the City Assessor had anything to do with the assessments for general taxation (Trans. 131). The assessments themselves show that they were made by the County Assessor (Trans 50-51), as is the case with all real estate in the city. The City Assessor cannot for general taxes raise the assessments of the County Assessor.

Constitution of Missouri, Art. X, Sec. 11;  
Rev. St. Mo. 1919, Sections 13, 150, 13, 154.

As a matter of fact, we do most strenuously contend that the assessment of unplatted, unimproved, outlying tracts in Kansas City for general taxation is as low as twenty per cent and usually even lower. We can prove by evidence, if the question becomes material, that fifteen per cent is not an unusual figure, and that in cases it is even less. The question has not yet become material, because the complainants, while alleging that the tax bills are confiscatory, have adduced no evidence whatever to sustain that allegation, but have left the court to speculate as to what the proportion of assessment may be. This speculation by the court is utterly indefensible.

Even the special assessment made in this grading proceeding by the City Assessor is no evidence of value. As said in *Martin v. N. Y. & N. E. Ry. Co.*, *supra*, "the value of property by assessors is solely for the purpose of determining the amount it shall pay as taxes," and in *Hamilton v. Seaboard Air Line*, *supra*, "It is well understood that it is the custom of the Assessors to fix a uniform rather than an actual valuation." So in this case,

the valuation by the City Assessor was for the purpose of distributing the cost only, not for the purpose of justifying the improvement or determining real values.

Based upon these figures, the lower court found that the total cost of the grading equals approximately twenty-six per cent of the total assessed valuation of the district as fixed by the City Assessor. But there is no evidence that the benefit did not equal twenty-six per cent, or that twenty-six per cent is under the circumstances, confiscatory. The statement of the lower court that the tax bills unreasonably exceed any possible benefit to the benefit district is wholly without justification in the record. There is not a scintilla of evidence to support it.

## V.

Even if it be established by competent evidence that the tax bills against complainants' lands exceed the special benefits thereto, such fact would not be sufficient to invalidate the tax bills.

There was some general testimony by witnesses Ellison and Jones that complainants lands were not benefited in an amount nearly so great as the tax bills against such lands. This testimony will not warrant setting aside the bills. It has been many times held that whether and to what extent the tax bills exceed in amount the actual benefits to individual tracts, are not judicial questions.

*St. Louis v. Brewing Co.*, 96 Mo., 677, 10 S. W., 477;

*Michael v. St. Louis*, 112 Mo., 610, 20 S. W., 666;

*St. Louis v. Ranken*, 96 Mo. 497, 9 S. W., 910;  
*Chadwick v. Kelley*, 187 U. S. 540, 23 S. Ct., 175;  
*Prior v. Construction Co.*, 170 Mo., 439, 71 S. W.,  
 205;  
*Heman Construction Co. v. Wabash R. R.*, 206  
 Mo. 172, 104 S. W., 67;

## VI.

**The suit in the Circuit Court of Jackson County complies with the provisions of the charter and ordinances and comports with due process of law.**

### A.

It is alleged that the provisions of Section 28 of Article VIII of the charter were not complied with in that no suit was filed "in the name of the city against the respective owners of land chargeable under the provisions of this section with the cost of such work." Inasmuch as the tax bills are made by the charter *prima facie* evidence of the regularity and legality of the entire proceedings, there is a presumption that all necessary steps were duly taken.

Sec. 24, of Art. VIII, Charter of Kansas City;  
*Collins v. Jaicks*, 279 Mo., 404, 214, S. W., 397.

The suit filed in the Circuit Court was entitled "In the Matter of the Grading of Meyer Boulevard from the West Line of Swope Parkway to the East Line of the Paseo, Un-

der Ordinance No. 21831, Approved January 26, 1915." The petition begins:

"Comes now Kansas City, Missouri, by A. F. Evans, City Counselor, and Jay M. Lee, Assistant City Counselor, and alleges....."

A later paragraph begins:

"Kansas City further states and alleges....."

And the prayer is:

"Kansas City also prays the court to find and determine....."

The petition is signed:

"Kansas City, by A. F. Evans, City Counselor, Jay M. Lee, Asst. City Counselor." (Trans. 87-88).

The record entries in the case read:

"Now comes Kansas City....." (Trans. 73-79).

The petition alleges the passage and approval of the grading ordinance and sets it out in full; the approval and adoption of plans and specifications; the making of approximate estimates of cost, of which copies were attached to the petition. It defines and sets forth the limits of the benefit district.

Service was had by publication, the order of publication being directed "To All Persons Whom It May Concern," and containing the substance of the ordinance, the filing of the suit, the limits of the benefit district prescribed by the ordinance, and a notice of the time and place of hearing. (Trans. 97-99). This was in accordance with Section 11 of Article XIII of the charter, under the terms of which Section 28 of Article VIII provides that service shall be made. (Trans. 28-29).

Gertrude P. Brown, one of the complainants in the companion suit now pending in the Circuit Court of Appeals,

8th Circuit, and some other property owners, appeared and answered in the suit. She appeared at the entry of judgment, and later filed a motion for new trial which was overruled and excepted to.

**(1) The proceeding is in the name of the city.**

It is first said that this proceeding is not in the name of the city. There is no merit in the contention for these reasons.

The caption is no part of the petition.

*State v. Patton*, 42 Mo., 530;  
*Livingston v. Coe*, 4 Neb., 379.

The names of the parties need not be set forth in the caption—it is sufficient if they appear in the body of the petition.

*State v. Patton*, 42 Mo., 530;  
*Beattie v. Lett*, 28 Mo., 596.

Even though a statute expressly requires that the parties be named in the caption, the failure of the caption to include them is a mere defect of form, and does not go to the jurisdiction of the court. A judgment rendered on the petition has full force and effect. The defect cannot be taken advantage of in a collateral proceeding.

*Ammerman v. Crosby*, 26 Ind., 451;  
*Smith v. Watson*, 28 Ia., 218.

The fact that a proceeding is entitled "In the Matter of\_\_\_\_\_" instead of having the usual heading naming the parties is quite immaterial so far as the cause of action is concerned.

*In re Clary's Estate*, 112 Cal., 292, 44 Pac. 569.

It is beyond question, therefore, that the caption itself is unimportant, and that the wording of the petition and of the journal entries shows a proceeding in the name of the city.

*Kansas City v. Mastin*, 169 Mo. 80, 68 S. W., 1037.

**(2) The proceeding is against the respective land owners.**

It is next said that the proceeding is not brought against the respective owners of land to be charged. This contention is likewise without merit. The charter provision does not require that the names of all owners shall be set forth in the petition. The provision, reasonably interpreted, means only that the respective owners of land in the district shall be served with process in the proceeding, and be afforded respectively a hearing therein. This is the only reasonable interpretation when we consider that in one proceeding under the Section there may be hundreds of land owners in the benefit district. In such a case it would be well-nigh impossible, and certainly futile, to recite the various names.



It must be borne in mind that the proceeding is purely *in rem*. No judgment is rendered against the owners of property. The tax bills are a lien on the land, and can be enforced against it only. Persons are interested, because their lands are affected, and therefore they should be notified of the pendency of the proceeding, but the suit is in no sense a suit against them.

From the very nature of the proceeding it cannot be a suit against the respective property owners, as complainants interpret the phrase. The charter provision is not to be given the same construction as would be proper were the proceeding *in personam*. If the suit provided for were one *in personam*, against individuals, the interpretation might be otherwise.

It is axiomatic that a petition need state those facts, and no more, which are essential to the cause of action declared on. In the absence of a charter requirement that the names of the property owners be set out in the petition filed in the Circuit Court, it seems clear that those names would not be requisite parts. No relief is asked against the property owners. No allegation could be made against them except that they own the property. There is absolutely no purpose in connecting them with the proceeding in any way except to give them due notice and an opportunity to be heard.

All possible question as to this interpretation is removed by the provisions for the order of publication. In Section 11, Article XIII, which governs service of process in the proceeding, it is expressly provided that the published notice "shall be directed to all persons whom it may concern, without naming them, notifying them of the day

and place." Beyond question, then, the order of publication need not name the individual owners. If so, there is no practical advantage or purpose in stating the names of the owners in the petition.

The purpose of naming the defendants in a suit *in rem* is to give them notice of the pendency of the action. As a matter of practice, this is accomplished by the order of publication. It would seem that if the names need to appear any place in the proceeding, they should be given in the order of publication. Where the charter expressly and unequivocally says that the order of publication need not name the property owners, there is no justification for assuming that the words "against the respective owners" requires that the names appear in the petition.

Special attention is called to that part of Section 11, Article 13, which provides as follows:

"Notice so given by publication shall be sufficient to authorize the court to hear and determine the cause and to make any finding or order or render any judgment therein as fully as though all the parties interested at the time of taking effect of such ordinance or at any time thereafter had been sued by their proper names and had been personally served."

If this section be read in connection with Section 28 of Article VIII, as should be done, there seems to be an express recognition that the owners need not be sued by name.

We submit that the only reasonable interpretation of the clause in question is, not that the names of the respective owners must be set forth in the petition (a useless requirement), but that the respective owners be served with process

and be afforded an individual, not a joint, hearing in the trial of the cause.

So far as the question of notice is concerned, the substantial thing is the order of publication. It is that which is published. It is that which is relied upon to give notice to the property owners of the existence of the proceeding. Where the Charter definitely says that the order of publication need not name the property owners, it is manifest how formal and technical is a requirement, if there be one, that the owners be named in the petition.

Complainants lay much emphasis upon the word "respective." It should be construed with reference to the latter part of the third paragraph of Section 28, which is as follows:

"And the respective owners of lots, tracts and parcels of land within said benefit district shall have the right to introduce evidence tending to show the invalidity or lack of legality of said ordinance, and said proposed lien against the respective lots, tracts and parcels of land owned by each respective defendant."

When the Charter says that the City shall file a proceeding against the respective owners of lands chargeable with the cost of the work, it clearly means that the proceeding shall be filed against those owning the respective tracts in the benefit district. Here is a plain recognition that the proceeding concerns primarily the lots or tracts, and a requirement that the owners of these lots or tracts be afforded a hearing.

Certainly, there is nothing in the word "respective" inconsistent with defendants' interpretation of the provision.

"Respective" has reference only to the causes of action as to the separate or respective lots.

Even if the provision could on any theory be taken to mean that the names of the property owners should appear in the petition, non-compliance would be a defect of form merely, as we have shown, and hence cured by judgment. Moreover, such requirement has been substantially complied with. As Plaintiff's Exhibit 24 shows, there was filed along with the petition a map or plat, a copy of which is in evidence here as Plaintiff's Exhibit 12, containing the names of the respective property owners in the district. This map or plat is definitely referred to and identified in Ordinance No. 21831, a certified copy of which was filed with the petition, and made a part thereof, as Exhibit A. The plat may be considered along with the petition in this connection, and if any matter, omitted from the petition proper, is supplied by the plat, the proceeding cannot be complained of.

*Goodrich v. Detroit*, 184 U. S., 432, 22 S. Ct., 397;  
*Kansas City v. Mastin*, 169 Mo., 80, 68 S. W., 1037;  
*Jackson v. Waterway District*, 85 Wash., 301, 147  
 Pac., 1140;  
*Reed v. Cedar Rapids*, 137 Ia., 107, 111 N. W., 1013.

Substantial compliance with such a Charter provision is all that is required.

*Ammerman v. Crosby*, 26 Ind., 451;  
*Black v. McGonigle*, 103 Mo., 192, 165 S. W., 615.

Furthermore, service of process being had in strict accordance with the Charter, the property owners were duly in court, and defects in the pleadings, not objected to, were waived by all parties.

*State ex rel. v. Lundquist*, 103 Wash., 339, 174 Pac., 440.

The decree of March 29, 1915, approving publication, and finding that lawful service had been had, is conclusive as to all such matters. It must therefore be taken as fact that complainants and other property owners in the district were duly summoned into Court. Complainants are thereby precluded from questioning the defects in pleading now complained of.

*Lingo v. Burford*, 112 Mo., 149, 20 S. W., 459;  
*Nemally v. Joest*, 74 Ind., 409.

As stated by the Supreme Court of Missouri in *Fitzgerald v. De Soto Special Road District*, 195 S. W., 695, 697 (Mo.):

"Where the court had jurisdiction of the subject-matter and person of plaintiff, as in this case, and where the record affirmatively recites the facts necessary to confer jurisdiction, the judgment of said court, in respect to such a matter, is not only conclusive in a collateral proceeding like this, but would be equally so in a direct proceeding in equity, to set aside the judgment, unless it appears that fraud was practiced in the very act of obtaining judgment."

**B.**

**If, however, the Circuit Court suit is defective, these defects are not fatal since the suit was not necessary to due process. Section 24 of Article VIII of the Charter provides in part:**

“The ordinance authorizing any public improvement and the contract therefor, and approving and confirming such contract, shall operate and shall be held by all departments and courts, to cure all errors and irregularities, if any, on the part of the City in the proceedings relating to such improvements, up to and including the time such ordinance take effect, and no tax bills shall be defeated, or the amount or lien thereon in anywise be affected, by reason of any such error or irregularity.”

Perhaps this provision of the Charter could not constitutionally be given effect as to defects of substance in prior stages of the proceeding, where such prior stages are requisite to due process of law. For example, if the Circuit Court suit were necessary, in order to comply with the 14th Amendment, a failure to publish the order of publication in that proceeding (a defect which might deprive the court of jurisdiction) could not perhaps, be corrected by some later action of the City Council, though mere defects of form could always be corrected. But if, as in the present situation, the Circuit Court suit, although authorized by the Charter, might be omitted altogether, without affecting the constitutionality of the Section, a totally different consideration applies. Steps in the Circuit Court suit in such case can be changed or done away with or corrected by later proceedings of the council.

To use a simple illustration, let us suppose a charter requirement that after an ordinance to grade has been passed it shall be submitted to the city counselor for his opinion. Suppose a further charter provision that the failure to submit the ordinance to the city counselor shall not invalidate the proceeding. The latter provision would certainly be effective.

The situation under Section 28, Article VIII, is similar. A suit in the Circuit Court is provided for. Such a suit is not essential to due process of law. There is a further provision in the Charter that the ordinance confirming the contract which is passed after the Circuit Court proceeding has been completed, shall cure all errors or irregularities in the prior proceedings. The effect of such a provision is to correct and do away with and render immaterial to the validity of the tax bills all defects whatsoever in the suit.

That the Circuit Court proceedings is not required by due process of law is abundantly established. *Saxton National Bank v. Carswell*, 126 Mo., 436, *supra*, holds constitutional a statute identical, in substantial respects, with Section 28, with the court proceeding eliminated. This statute governs cities of the second class in Missouri, and has been in force for a great number of years. It is embodied in Section 9046-9049, Revised Statutes of Missouri, 1909.

The following cases affirm this conclusion. The hearing which the property owner is afforded in the suit on the tax bill satisfies due process of law.

- Voigt v. Detroit*, 184 U. S., 115, 22 S. Ct., 337;  
*Goodrich v. Detroit*, 184 U. S., 432, 22 S. Ct., 397;  
*Paulsen v. Portland*, 149 U. S., 30, 13 S. Ct., 750;  
*Walston v. Nevin*, 128 U. S., 578, 9 S. Ct., 192.

Of course it is true that if the Circuit Court suit was not had substantially as prescribed by the charter, the judgment could not be *res judicata* of the issues involved, as contended under Point VII of this brief, but so far as affecting the validity of the bills is concerned, the passage of Ordinance No. 24693 renders immaterial all defects in the proceeding.

### C.

**The suit in the Circuit Court comports with due process of law. Service by publication in special assessment proceedings is constitutional.**

*Kansas City v. Duncan*, 135 Mo., 571, 37 S. W., 624;  
*Kansas City v. Ward*, 134 Mo., 172, 35 S. W., 600;  
*Kansas City v. Mastin*, 169 Mo., 80, 68 S. W., 1037;  
*Lent v. Tillson*, 140 U. S., 316, 11 S. Ct., 825.

An order of publication directed to all persons whom it may concern without naming them, meets the constitutional requirement.

*Kansas City v. Ward*, 134 Mo., 172, 35 S. W., 600;  
*Kansas City v. Duncan*, 135 Mo., 571, 37 S. W., 624;  
*State v. Blair*, 245 Mo., 680, 151 S. W., 148.

The order was not improper because it set out the limits only of the benefit district, instead of a legal description of the lands therein. Section 28 provides that the petition shall "define and set forth the limits of the



benefit district'', and Section 11 directs that the order recite the substance of the ordinance. This clearly justifies the order as published and is valid.

*State ex rel. v. Wilson*, 216 Mo., 215, 115 S. W., 549.

See also:

*Doris v. Pittsburgh Plate Glass Co.*, 163 Ind., 599,  
70 N. E., 249;

*Cleveland Ry. Co. v. Porter*, 210 U. S., 177, 28 S.  
Ct., 647.

## VII.

**The suit in the Circuit Court finally determined all questions raised or involved therein, and all such questions are now res judicata.**

If Section 28 of Article VIII be constitutional, as we have shown, and if cause No. 90628 was had in due compliance therewith, as we have likewise shown, then it follows that complainants cannot now raise objections open to them in that proceeding. Every issue herein is therefore disposed of by that suit, except the assessment proceedings which did not take place till later. That this would be the effect of an ordinary judgment is conceded. It is contended, however, that the decree in the Circuit Court suit has not such binding force.

It is first argued that the Circuit Court had no jurisdiction to render any judgment with any force. The argument is grounded upon a misunderstanding of the function

which, pursuant to the Charter, the court is to perform. The Circuit Court was not authorized merely to determine the validity of the ordinance, and therefore the proceeding is not similar to those involved in *Muskrat v. U. S.*, 219 U. S., 346; *State ex rel. v. Westport*, 135 Mo., 120, 36 S. W., 663, and other like cases. Such is not the nature of the proceeding. It is not a suit to obtain the opinion of the court as to the constitutionality of Ordinance No. 21831. On the contrary, the object is the fixing of the benefit district.

The Charter clearly authorizes and directs the Court to determine the limits of the district. The second, third and fourth paragraphs of Section 28, Article VIII, provide in part as follows:

"The prayer of the petition shall be that the court find and determine the question of whether or not the respective tracts of land within said benefit district shall be charged with the lien of said work in the manner provided by said ordinance. \* \* \*

In such proceedings the city shall have the right to offer evidence tending to prove the validity of \* \* \* said proposed lien against the respective lots, tracts and parcels of land within said benefit district sought to be charged with such lien; and the respective owners of lots, tracts and parcels of land within said benefit district shall have the right to introduce evidence tending to show the invalidity or lack of legality of \* \* \* said proposed lien against the respective lots, tracts, and parcels of land owned by each respective defendant; and the court shall have the right to determine the question of whether or not the said lots, tracts and parcels of land owned by each defendant should be charged with such lien. \* \* \*

The court shall render judgment either validating such \* \* \* proposed lien against the lots, tracts and parcels of land within said benefit district or against

*such lots, tracts, or parcels of land as the court may find legally chargeable with the same, or the court may render judgment that such \* \* \* proposed lien is, in whole or in part, invalid and illegal."*

It is perfectly evident that the court is to determine the district to be assessed. The court is directed to find and determine whether or not the tracts of each defendant shall be charged with the lien of the work, and shall render judgment invalidating the proposed lien or validating it against such tracts as the court may find legally chargeable therewith.

The evidence authorized to be introduced must be evidence bearing on the question of relative benefits, introduced for the purpose of enabling the court to decide where the limits of the district should be established. And if, from the evidence before it, the court decides that the benefit which will probably accrue to a particular tract is so slight that the tract should not be assessed, that tract may be excluded from the district established.

The petition filed in the case recognizes this principle. Kansas City "prays the court to find and determine the \* \* \* question of whether or not the respective tracts of land within said district shall be charged with the lien of said work", and the order of publication is framed on the same theory.

It is of course true that courts will not take cognizance of mere moot questions and that adjudications in such cases are perhaps binding upon no one. A court will not entertain a suit simply to declare a statute constitutional or unconstitutional. The language of Mr. Justice Brewer in *Tregea v. Modesto Irrigation District*, 164 U. S., 179, 17 S. Ct., 52,

quoted by the lower court in its opinion, was nothing more than an expression of this rule. It has no reference whatever to a suit filed by a city against the owners of property in a benefit district to determine whether the district is a proper and reasonable one with power in the court to exclude property if not benefited and to hold the district invalid if it exclude property that should have been included or is otherwise unfair.

The argument that there were no adverse litigants is wholly untrue. The suit was filed by Kansas City and was a proceeding *in rem* in which the owners of the property were duly brought into court. Several of them actually appeared and contested the litigation. Others made default. All were served and had an opportunity to contest if they desired. The judgment held the ordinance fixing the district valid and adjudged that the lands of the defendant might be charged with the lien of the tax bills. This would seem to be a proper justiciable controversy *in rem*.

*Gibler v. Mattoon*, 167 Ill., 18, 47 N. E., 319;

*Morgan Creek Drainage Dist. v. Hawley*, 255 Ill., 34, 99 N. E., 68;

*People v. Linda Vista Irrigation Dist.*, 128 Cal., 477, 61 Pac., 86;

*Rialto Irrigation Dist. v. Brandon*, 103 Cal., 384, 37 Pac., 484.

There are many cases in which the judgment of the court simply declares or establishes a status. A judgment establishing a will, a decree of divorce, a decree annulling a marriage—are of this character. The judgment in the suit

to quiet title to real estate under the Missouri statutes is analogous.

The case of *In re Union Railway Co.*, 112 N. Y., 61, 19 N. E., 664, is apposite. The statute involved provides for a proceeding to determine whether an elevated railway shall be constructed in the face of the opposition of the property owners affected. The court holds that such a question may properly be passed upon, and that the decision amounts to a judgment *in rem*, conclusive against all mankind.

Complainants sought in the trial court to establish the proposition that the city and the contractor (through whom defendants claim) are not in privity. But no privity is required. This follows as a corollary to the fact that a proceeding *in rem* is not a suit between individuals. Provided there be proper notice, the judgment is conclusive against the whole world. The question of privity or no privity does not enter in.

*Gelston v. Hoyt*, 3 Wheaton, 246;

*Meriwether v. Block*, 31 Mo. App., 170;

*People v. Linda Vista Irrigation Dist.*, 128 Cal., 477, 61 Pac., 86;

*First Nat. Bk. v. McCaskill*, 174 N. C., 362, 93 S. E., 905;

*Christianson v. King County*, 239 U. S., 356, 36 S. Ct., 114.

Complainants could have been heard in the Circuit Court on the question of the reasonableness of the benefit

district; on the claim that their lands were not benefited; on the contention that lands abutting on the improvement were benefited in a greater degree than lands at a distance; on the allegation that the improvement is of a general rather than a local nature; on the suggestion that Swope Park should be in the district; and on any other question going to the validity or propriety of the ordinance fixing the district as it was fixed. Complainants are not entitled to another day in court on these matters but are concluded by the judgment in the Circuit Court.

*St. Louis v. United Rys.*, 263 Mo., 387, 174 S. W., 78;  
*Spratt v. Early*, 199 Mo., 491, 97 S. W., 925.

Every one of the questions mentioned was set up in the answers filed, every one was necessarily involved in the issues before the court and every one was determined by the judgment rendered. If these matters are not rendered *res judicata* by that judgment, then it is difficult to find any scope for the doctrine in any case.

The question of the reasonableness of the benefit district, which as much as anything seemed to move the trial court, was definitely put out of the case by the judgment of the Circuit Court upon that very matter.

*Little River Drainage District v. Railroad*, 236 Mo.,  
 94, 139 S. W., 330;  
*McGhee v. Walsh*, 249 Mo. 266, 155 S. W., 445.

## VIII.

Since the trial and judgment in this case, the Supreme Court of Missouri has decided a case involving all the questions raised in this case.

*Schmelzer v. Kansas City*, 295 Mo. 322, 243 S. W. 946.

This was a suit to enjoin proceedings under Section 28 of Article VIII, similar in all legal respects to the proceedings in controversy. Of course, the improvement was different and other property was included in the benefit district, but all the steps taken were substantially identical with those now under consideration. Every question raised in this case, was urged in that; the invalidity of the method of assessment; the unreasonableness of the benefit district; the unconstitutionality of the proceedings; the excessive amount of the assessment over the benefit; the invalidity and ineffectiveness of the suit in the Circuit Court, because not brought as provided in the charter and because merely declaratory; the lack of due process of law.

The court sustains the proceedings *in toto*, upholding the provisions of the charter and giving effect to the suit in the Circuit Court to its fullest extent as *res judicata*. So far as the Supreme Court of Missouri can establish the validity of a Missouri law and proceedings thereunder, this case has done so, as to the law and proceedings in controversy here.

That court cannot, of course, determine finally the validity or invalidity of a statute under the United States Con-

stitution, yet as to all other questions the decision of the state court is conclusive. The state court having construed Section 28 of Article VIII as requiring only the character of suit filed in the Circuit Court in this proceeding, that holding must be followed here.

*Forsyth v. Hammond*, 166 U. S. 506, 17 S. Ct., 665;  
*Wade v. Travis Co.*, 174 U. S. 499, 19 S. C. 887;  
*Mo. etc. Co. v. Cade*, 233 U. S. 642, 34 S. Ct., 678;  
*Quinette v. Pullman Co.* (C. C. A. 8th Cir.) 229  
 Fed., 333; 143 C. C. A., 453.

This rule is applicable also to the construction of a local, municipal statute.

*Thomas Cusack Co. v. Chicago*, 242 U. S., 526, 37 S. Ct., 190;  
*St. Louis etc. R. R. Co. v. Quinette* (C. C. A. 8th Cir.), 251 Fed., 773, 164 C. C. A., 7.

And the conclusion is inevitable that, since this suit as filed is the suit provided for in the charter, and the service and proceedings thereunder conform to due process of law, the question whether the judgment in the suit is *res judicata* or not becomes one of state law and is conclusively determined by the State Supreme Court.

This eliminates from this appeal every issue except: first, the constitutionality of the assessed valuation method of apportioning benefits; and second, the constitutionality of the appraisement provided for in Section 3 of Article VIII. As to these two issues, the authorities heretofore cited are



absolutely conclusive. They summarily dispose of the case and require the reversal of the judgment and the dismissal of the bill.

Respectfully submitted,

JUSTIN D. BOWERSOCK,

SAM'L J. MCCULLOCH,

FRANK P. BARKER,

G. V. HEAD,

*Hunter M. Meriwether* Attorneys for Appellants.

BOWERSOCK & FIZZELL,

MILLER, CAMACK, WINGER & REEDER,

*of Counsel.*

(29,287)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 168

McMILLAN CONTRACTING COMPANY AND FIDELITY  
NATIONAL BANK & TRUST COMPANY OF KANSAS  
CITY, APPELLANTS,

vs.

B. HAYWOOD HAGERMAN

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE WESTERN DISTRICT OF MISSOURI, TRANSFERRED FROM THE  
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH  
CIRCUIT

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[fol. a]

IN THE

**DISTRICT COURT OF THE UNITED STATES FOR THE  
WESTERN DIVISION OF THE WESTERN DISTRICT OF  
MISSOURI**

In Equity. No. 207

B. HAYWOOD HAGERMAN, Complainant,

v.

McMILLAN CONTRACTING COMPANY, a Corporation, and Fidelity  
National Bank and Trust Company of Kansas City, a Corporation,  
Defendants.

CITATION AND SERVICE—Filed Jan. 6, 1922

United States of America to B. Haywood Hagerman, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit in the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to the petition for appeal and assignment of errors filed in the Clerk's office of the United States District Court for the Western Division of the Western District of Missouri, wherein McMillan Contracting Company, a corporation, and Fidelity National Bank and Trust Company of Kansas City, a corporation, are defendants and appellants, and B. Haywood Hagerman is complainant, and appellee, to show cause if any there be why the judgment and decree entered against said appellants in said cause, as in said assignment of errors mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Arba S. Van Valkenburgh, Judge of said District Court, this 4th day of January, 1922.

Arba S. Van Valkenburgh, District Judge.

Service of the within citation is hereby acknowledged this 6th day of January, 1922.

Marley & Reed, Attorneys for B. Haywood Hagerman, Appellee.

Endorsed: Filed January 6, 1922.

[fol. b] [File endorsement omitted.]

[fol. 1]

## CAPTION

UNITED STATES OF AMERICA, set:

Be it remembered, that heretofore, to-wit, at the regular November Term of the United States District Court for the Western Division of the Western District of Missouri, and on the 3rd day of February, 1920, an Amended Bill of Complaint was filed in the cause wherein Bert Steeper was originally and B. Haywood Hagerman is now complainant and McMillan Contracting Company, a corporation, and Fidelity Trust Company, a corporation, are defendants.

Said Amended Bill of Complaint is in words and figures as follows, to-wit:

[fol. 2] IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI

[Title omitted]

## FIRST AMENDED BILL OF COMPLAINT—Filed Feb. 3, 1920.

Now comes Bert Steeper and brings this his equitable bill of complaint against McMillan Contracting Company, a corporation, and Fidelity Trust Company, a corporation; and thereupon, your complainant alleges and declares:

1. That at and before the filing of his original bill of complaint herein, and at all times and dates hereinafter mentioned the McMillan Contracting Company and the Fidelity Trust Company were and still are corporations, organized and existing according to the laws of Missouri, with their principal places of business in Kansas City, Jackson County, Missouri, and are residents and citizens of the Western Division of the Western District of Missouri.

2. That the amount involved in this controversy exclusively of interest and costs is \$12,511.60.

3. That the controversy herein arises under and involves the construction of the constitution of the United States and particularly the 14th amendment of said constitution, as hereinafter specifically shown.

4. That heretofore, in the year 1908 the City of Kansas City, Missouri, purporting to act pursuant to the constitution and laws of [fol. 3] the state of Missouri adopted its Charter, which said Charter has ever since been and now is, treated by said City as being in full force and effect; that Section 28 of Article 8 of said Charter, provides that:

"Sec. 28 Grading, etc.—When Too Heavy Burden on Benefit District, as Limited in Section 3 of this Article—Benefit Limits May Be Determined by Ordinance.—When in grading or regrading any street,

avenue, highway, or part thereof, a very large or unusual amount of filling in or cutting or grading away of earth or rock be necessary, necessitating an expense of such magnitude as to impose too heavy a burden on the land situate in the benefit district as limited in Section three of this article, and when in grading or regrading, constructing or reconstructing any street, avenue, highway, or part thereof, one or more bridges, viaducts, tunnels, subways, cuts or approaches on, along, over or under, the same is or are required or needed, the cost of grading or regrading such street, avenue, highway, or part thereof, including the cost of constructing or reconstructing such bridges, viaducts, tunnels, subways and approaches, or any of them, may be charged as a special tax on parcels of land (exclusive of improvements) benefited thereby, after deducting the portion of the whole cost, if any, which the city may pay, and in proportion of the benefits accruing to the said several parcels of land, exclusive of improvements thereon, and not exceeding the amount of said benefits, said benefits to be determined by the Board of Public Works as hereinafter provided, and the limits within which parcels of land are benefited shall in all such specified instances be prescribed and determined by ordinance. If the Common Council shall find and declare in the Ordinance providing for the doing of the work above described that a very large or unusual amount of filling in or cutting or grading away of earth or rock be necessary, necessitating an expense of such magnitude as to impose too heavy a burden on the land situated in the benefit district as limited in Section three of this Article, or that in grading or regrading, constructing or reconstructing any street, avenue, highway, or part thereof, one or more bridges, viaducts, tunnels, subways, cuts or approaches, on, along, over or under the same is, or are required or needed, the finding and declaration in said ordinance shall be final and conclusive as to all such matters.

[fol. 4] Public Works Shall be Provided for by Ordinance Proceedings in Circuit Court against Owner.—Petition to Contain, What.—The public work described above shall be provided for by ordinance, and the city may provide that after the passage of the ordinance, and after an approximate estimate of the cost of the work shall have been made by the Board of Public Works, the city shall file a proceeding in the Circuit Court of Jackson County, Missouri, in the name of the city, against the respective owners of land chargeable under the provisions of this section with the cost of such work. In such proceeding the city shall allege the passage and approval of the ordinance providing for the work, and the approximate estimate of the cost of said work; and shall define and set forth the limits of the benefit district, prescribed by the ordinance, within which it is proposed to assess property for the payment of said work. The prayer of the petition shall be that the court find and determine the validity of said ordinance and the question of whether or not the respective tracts of land within said benefit district shall be charged with the lien of said work in the manner provided by said ordinance.



**Process—What Parties May Offer in Evidence—**Service of process in such proceeding shall be governed by the provisions of Section eleven (11), of Article Thirteen (XIII) of this Charter, relating to service of notice and summons in proceedings for the ascertainment of benefits and damages for the condemnation of lands for parks and boulevards. In such proceedings, the city shall have the right to offer evidence tending to prove the validity of said ordinance, and said proposed lien against the respective lots, tracts and parcels of land within said benefit district sought to be charged with such lien; and the respective owners of lots, tracts and parcels of land within said benefit district shall have the right to introduce evidence tending to show the invalidity or lack of legality of said ordinance, and said proposed lien against the respective lots, tracts, and parcels of land owned by each respective defendant; and the court shall have the right to determine the question of whether or not the said lots, tracts and parcels of land owned by defendant should be charged with such lien.

**Trial—Judgment.**—The trial of such proceedings shall be in accordance with the Constitution and Laws of the State, and the court shall render judgment either validating such ordinance, and proposed lien against the lots, tracts, and parcels of land within said benefit district or against such lots, tracts or parcels of land as the court may find legally chargeable with the same, or the court may render judgment that such ordinance or proposed lien are, in whole or in part, invalid and illegal.

[fol. 5] **Appeal—What Court Shall Determine.**—Any appeal taken from such judgment must be taken within ten days after the rendition of such judgment, or if a motion for a new trial be filed therein, then within ten days after such motion may be over-ruled or otherwise disposed of; but in all other respects the rules covering such appeal shall be the same as provided by Section Eighteen (18) of Article Thirteen (XIII) of this Charter.

**No Appeal, or After Determination of—City May Enter into Contract, etc.**—If no appeal shall be taken, or after the determination of such appeal the city may enter into a contract with the successful bidder to whom such work may be let; and, after the work under such contract shall have been fully completed, the estimate of the cost thereof, and the apportionment of the same against the various lots, tracts and parcels of land within the benefit district shall be made by the Board of Public Works according to the assessed value thereof, exclusive of improvements, with the assistance of the City Assessor, as provided in Section three of this article, and all of the provisions of Section three of this article relating to the apportionment of special assessments, and the levy, issue and collection of special tax bills as in grading proceedings as in said section specified, shall apply to special tax bills issued pursuant to this section, except that said tax bills may be made payable in not to exceed ten annual installments; the number of installments and the times when payable to be determined by the Common Council on the recommendation of the Board of Public Works, such determination to be de-

terminated in the ordinance of the Common Council in which said work is authorized and the proceedings thereof instituted.

**Meaning and Intent of This Section.**—Nothing in this section stated shall in anywise affect, modify or change the provisions of the previous sections of this article, or in any manner affect or change the proceedings and remedies therein set forth for the doing of the public work and the payment therefor by the issue of special tax bills; the intention of this section being to provide an independent and separate method of public improvements made under the provisions of this section."

5. That in January, 1915, the City Council of Kansas City, Missouri, attempted to pass and enact Ordinance No. 21831, which ordinance was approved and purported to become effective January 26th, [fol. 6] 1915, and reads and provides as follows:

"Ordinance No 21831

An Ordinance to Grade Meyer Boulevard from the West Line of Swope Parkway to the East Line of The Paseo and to Condemn Easements to Support Embankments or Fills, Describing the Nature of the Improvement, Providing How the Cost Thereof Shall be Paid, and Prescribing the Limits within which Private Property is Deemed Benefited by the Proposed Improvement, and Assessed and Charged to Pay Damages Caused by Said Grading and by the Condemnation of Said Easements, and Assessed and Charged to Pay the Cost of Said Improvements.

Whereas, the Board of Park Commissioner- has, by Resolution, No. 1762, adopted on the 11th day of December, 1914, recommended to the Common Council of Kansas City that Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, be graded to the full width thereof, and to the established grade of the same, and that easements to support embankments or fills be condemned, and

Whereas, the Board of Public Works, by its Resolution under Entry No. 73992, on the 11th day of December, 1914, has joined in said recommendation, now therefore,

Be it ordained by the Common Council of Kansas City:

Section 1. That the boulevard or highway known and designated as Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, be graded to the full width thereof and to the established grade of the same.

Section 2. That as the proposed grading of said Meyer Boulevard, or part thereof, to the established grade for the full width thereof will cause certain embankments or fills to be made leaving abutting property below the proposed grade of said boulevard or highway, there is hereby condemned in said abutting property easements or right to support said embankments or fills so far as may

be necessary to bring the said boulevard or highway to the required grade, and by allowing the material of which said embankments are made to fall upon the abutting land at the natural slope so that the surface of the boulevard or highway may be graded to the full width thereof. The areas of land in which said easements are condemned are shown in the plat forming part of the plans hereinafter referred to in Section 3 hereof, prepared and on file in the office of the Board of Park Commissioners, showing a profile of the portion of said boulevard or highway proposed to be graded and indicating thereon approximately the amount of the encroachment of the embankments, upon the abutting property, which said plat is [fol. 7] hereby referred to and identified. Just compensation for the easements herein condemned shall be assessed, collected and paid according to law.

Section 3. Said work and improvement shall be of the nature described and specified in, and shall be in accordance with the plans and specifications, adopted, perfected, and approved by the Board of Public Works, on the 11th day of December, 1914, by Resolution under its entry No. 93991, and by the Board of Park Commissioners of Kansas City, Missouri, on the 11th day of December, 1914, under Resolution No. 1761, which said plans and specifications are now on file in the office of said Board of Park Commissioners. Said improvement is hereby provided for and authorized.

Section 4. Whereas, private property may be disturbed or damaged by the grading herein provided for and authorized and the condemnation of the easements herein provided for, and the owners thereof lawfully entitled to remuneration or damages under the constitution of this state have not waived all right or claim thereto, it is ordered that proceedings to ascertain and assess all such damages or remuneration be begun and carried on as provided by Article VII of the Charter of said city; and the Common Council prescribes and determines the limits within which private property is deemed benefited by the proposed grading and improvement herein provided, and within which said property may be assessed or charged to pay such remuneration or damages, including the taking and damaging of private property for public use for or in the acquiring of said easements, to be as follows, to-wit:

Beginning at the intersection of the south line of Sixty-third (63d) Street with the west line of the east half of the east half of the northwest quarter of the southeast quarter of Section No. Four (4), Township No. forty-eight (48) North, Range No. Thirty-three (33) West; thence east along the south line of sixty-third (63d) Street and said line prolonged east to the east line of the west half of the southeast quarter of Section No. Three (3), Township No. forty-eight (48) North, Range No. Thirty-three (33) West; thence south along the east line of the west half of the southeast quarter of said Section No. Three (3), to the east prolongation of the north line of Sixty-seventh (67th) Street west of Swope Parkway; thence west along the east prolongation of the north line of Sixty-seventh

(67th) Street and along the north line of Sixty-seventh (67th) Street to the west line of Brooklyn Avenue; thence north along the west line of Brooklyn Avenue to a point two hundred (200) feet south of the south line of Meyer Boulevard; thence west to a point in the east line of The Paseo, ten hundred seventy-nine and nine-hundredths (1079.09) feet south of the north line of the southwest quarter of the southeast quarter of section No. Four (4); thence [fol. 8] north along the east line of The Paseo and said line prolonged north, said line being two hundred forty-seven and three-tenths (247.3) feet west of and parallel with the east line of the southwest quarter of the southeast quarter of said Section No. Four (4) to the north line of the southwest quarter of the southeast quarter of said Section No. Four (4); thence west along the north line of the southwest quarter of the southeast quarter of said Section No. Four (4), to the southwest corner of the east half of the east half of the northwest quarter of the southeast quarter of said Section No. Four (4); thence north along the west line of the east half of the east half of the northwest quarter of the southeast quarter of said Section No. Four (4) to the point of beginning.

Section 5. The Common Council hereby finds and declares that in the grading of said boulevard or highway a very large or unusual amount of filling in, or cutting or grading away of earth or rock is necessary, necessitating an expense of such magnitude as to impose too heavy a burden on the land situate in the benefit district as limited in Section Three (3) of Article VIII of the Charter of Kansas City.

Section 6. The cost of grading said boulevard or highway as provided herein, shall be charged as a special tax on parcels of land, (exclusive of improvements) benefited thereby after deducting the portion of the whole cost, if any, which the City may pay, and in proportion to the benefits accruing to the said several parcels of lands, exclusive of improvements thereon, and not exceeding the amount of said benefits, and benefits to be determined by the Board of Public Works and after said work shall have been fully completed, the cost thereof shall be estimated by the said Board of Public Works and shall be apportioned by said Board of Public Works against the various lots tracts and parcels of land within the benefit district, according to the assessed value thereof, exclusive of improvements, as provided in Section 28, of Article VIII of the Charter of Kansas City, aforesaid; and the limits within which parcels of land are benefited, and within which it is proposed to assess property for the payment of said work and improvement, are hereby prescribed and determined to be the same limits as are hereinbefore, in Section 4 of this Ordinance, prescribed and determined as the limits within which private property is deemed benefited by the proposed grading of said boulevard or highway, all in pursuance of Section 28 of Article VIII of the Charter of Kansas City, aforesaid.

Section 7. Payment of the cost of all of said work shall be made in Special Tax Bills evidencing special assessments made and levied against each lot or parcel of land chargeable therewith respectively, as set forth in Section 6 of this Ordinance. Said tax bills shall be payable in ten (10) annual installments according to law, the first [fol. 9] of said installment- to become due and collectible as provided in Section 25 of Article VIII of the Charter of Kansas City aforesaid, in the case of Tax Bills payable in installments, and the remaining installments shall be due and collectible, one each year thereafter, on the 30th day of June of each year until all said installments are paid.

The Common Council hereby finds and declares that its action herein has been recommended by the Board of Public Works and also by the Board of Park Commissioners.

The improvement provided for herein the Common Council deems necessary to have done, but the passage of this Ordinance and the doing of such work shall not render Kansas City liable to pay for such work, or any part thereof, otherwise than by the issue of Special Tax Bills and except as herein provided.

Section 8. The Board of Public Works shall make an approximate estimate of the cost of the work herein provided for, and after the passage of this Ordinance, and after such approximate estimate of the cost of said work, shall have been made by said Board, a proceeding separate from the proceeding provided for in Section 4 of this Ordinance, shall be filed in the Circuit Court of Jackson County, Missouri, in the name of the City, against the respective owners of land chargeable under the provisions of Section 28 of Article VIII of the Charter of Kansas City, aforesaid, with the cost of said work, for the purpose, and in the manner prescribed in said Section 28, of Article VIII of the Charter of Kansas City, Missouri, and as provided in this Ordinance.

Section 9. The Common Council hereby finds and declares that its action herein has been recommended by the Board of Park Commissioners of Kansas City, Missouri, and by the Board of Public Works, and that the said Board- have recommended to the Common Council that the above mentioned boulevard or highway be graded to the full width thereof as herein provided for and that easements to support embankments or fills be condemned as herein provided for and that payment for all said work be made in Special Tax Bills as herein provided for; and the action of said Board of Park Commissioners and the Board of Public Works in determining that said work shall be done and that the payment for same be made in special tax bills is hereby ratified and confirmed.

Section 10. All Ordinances, or parts of Ordinances in conflict with this Ordinance are, insofar as they conflict with this Ordinance, hereby repealed."

[fol. 10] A copy of which said plat referred to and provided for in said ordinance is hereto attached, marked Exhibit "A," and made a part hereof.

6. That while said Ordinance No. 21831, and particularly Section 8 thereof, provides and requires that after the passage of said ordinance and the approximate estimate of the cost of said work shall have been made by said Board of Public Works, that a proceeding, separate from the proceeding provided for in Section 4 of said ordinance shall be filed in the Circuit Court of Jackson County, Missouri, in the name of Kansas City, against the respective owners of land chargeable, under the provisions of Section 28 of Article VIII, of the Charter of Kansas City, aforesaid, with the cost of said work, for the purposes and in the manner prescribed in said Section 28 of Article VIII of said Charter, no suit or proceeding was brought or prosecuted in said Circuit Court of Jackson County, in the name of Kansas City against the respective owners of the land to be charged with the cost of said work, as required by said ordinance and Section 28 of Article VIII of said Charter, and hence the Board of Park Commissioner- was without right or authority to let a contract for said work and the Board of Public Works was without right or power to apportion or levy the cost of said work against the lands in said benefit district, or to issue tax bills for such work against said lands. That no suit or proceeding was instituted in said Circuit Court, except that on or about February 17th, 1915, there was instituted certain proceedings entitled "In the Matter of the grading of Meyer Boulevard from the West Line of Swope Parkway to the East Line of The Paseo, under Ordinance of Kansas City, Missouri, No. 21831, approved the 26th day of January, 1915," being the [fol. 11] cause No. 90628 in said Circuit Court, by which pretended proceeding it was sought to have the property located within the benefit district described in said ordinance, charged with a lien or a special tax on parcels of land located in said benefit district to pay for the cost of grading said boulevard or highway, as provided in said ordinance.

7. That at all of the times herein referred to, complainant, Bert Steeper's grantor was, and now Bert Steeper is, the owner of the following tracts of real estate situated in Kansas City, Jackson County, Missouri, to-wit:

The northwest quarter (N. W.  $\frac{1}{4}$ ) of the southwest Quarter (S. W.  $\frac{1}{4}$ ) of Section Three (3) Township Forty-eight (48), Range thirty-three.

which said real estate was and now is within the benefit district provided for in said ordinance, and by virtue of said Section 28 of Article VIII of the Charter of Kansas City, Missouri, and by virtue of said ordinance No. 21831, and by virtue of said proceedings so instituted in the Circuit Court of Jackson County, Missouri, hereinbefore referred to, it was sought to have said real estate so owned by said complainants, together with other real estate in said benefit district, charged with a lien or special tax for the purpose of paying the costs of grading Meyer Boulevard in said City as provided in said Ordinance.



8. That said proceeding bearing said Cause No. 90628, was not brought in the name of Kansas City, and was not against the respective owners of land chargeable under the provisions of Section 28 of Article VIII of the Charter of Kansas City, with the cost of said work, and was not against the complainant herein. That complainant never received any notice by summons or otherwise of said proceeding and did not appear therein; that complainant is informed [fol. 12] and believes and therefore alleges the fact to be that no evidence was introduced in said proceeding and no trial had therein, but that a pretended judgment was entered therein purporting to find and adjudge that said Ordinance No. 21831, hereinabove referred to, was valid and legal, and that a contract for the doing of the work provided for in said Ordinance might be entered into by Kansas City in conformity with said Ordinance, and as provided by the Charter and Ordinance of Kansas City, and that the proposed lien of the assessments for the payment of the cost of the work provided for in said Ordinance under said contract against the respective lots, tracts and parcels of land within the benefit district prescribed in said Ordinance, and each of them, respectively, assessed, apportioned and charged in the manner provided by said Ordinance and Charter of Kansas City, shall be a valid and legal lien, and that said lots tracts and parcels of land within said benefit district, might be charged with said lien respectively.

9. That on or about October 26th, 1915, the Board of Park Commissioner of Kansas City, Missouri, attempted to enter into a contract with the defendant, McMillan Contracting Company, for the work of grading said boulevard.

10. That thereafter, said McMillan Contracting Company proceeded with the work of grading said boulevard, and after said work was completed, or claimed to have been completed, the Board of Public Works of Kansas City, Missouri, proceeded to assess the cost of said grading against said parcels of land located within said benefit district including said land now owned by complainant, Bert Steeper, attempting to apportion the cost of such grading in accordance with the assessed value of said respective parcels of land, exclusive of improvements, under the provisions of said Section 28 of said Article VIII of the Charter of Kansas City, Missouri, and said Ordinance No. 21831; that in attempting to apportion said costs, as aforesaid, the Board of Public Works of Kansas City, Missouri, on or about November 14th, 1916, directed the City Assessor to make an assessment as to the value of said lands located in said benefit district, and on or about November 18th, 1916, the City Assessor assessed the value of the hereinbefore designated tract "A" of land owned by complainant, Bert Steeper, at a value of Forty-six Thousand (\$46,000.00) Dollars, four times the value ever assessed for general taxation by any assessor, state, county or municipal, and far in excess of the actual value thereof. That thereupon, on or about the 21st day of November, 1916, the said Board of Public Works of Kansas

City, Missouri, certified that it had apportioned the cost of the grading of Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, among the lots and parcels of land to be charged therewith, and that it had charged each lot or parcel of land with its proper share of said cost, and said Board of Public Works charged and apportioned against the said tract, designated as tract "A" owned by said complainant, Bert Steeper as its share of said cost, the sum of \$12,511.60; that thereupon, on or about November 23rd, 1916, special tax bills were issued by Kansas City, Missouri, to said McMillan Contracting Company against the said tract of land, designated as tract "A" in said sum of \$12,511.60; that thereupon the said McMillan Contracting Company sold and assigned some interest in and to said tax bills to the defendant, Fidelity Trust Company, the exact nature of which interest, the complainant does not now know, and therefore cannot allege.

[fol. 14] 11. That Kansas City has a park presented to it by one Thomas H. Swope in his lifetime containing about 1,400 acres. It is situated in the extreme southeast corner of its municipal limits. It contains many miles of parkways, drives and walks; it also has lakes, golf grounds, tennis courts, zoological museum, groves and is the principal play ground or place of resort for said Kansas City. Frequently from fifty to seventy-five thousand people go there in a single day in agreeable weather, and on other days, twenty, thirty and forty thousand go there during the spring, summer and autumn seasons. There is in effect and substance but one approach, that is, by Swope Parkway. Swope Parkway in many respects is not as attractive as the park itself, and furnishes inadequate facilities to the thousands who go to this park, and the number going is constantly increasing. It was desired by the municipal authorities of Kansas City to construct another entrance running east and west from The Paseo, a boulevard extending six miles from Seventh Street to the proposed highway, which has been designated as Meyer Boulevard. By the construction of Meyer Boulevard far better and more attractive and direct access will be given to Swope Park. The proposed Boulevard is 5,614.36 feet in length and varies in width. At some places it is less than 220 ft. in width. Near the entrance of the Park, and for several hundred feet said proposed boulevard is 500 feet in width, and at the junction of The Paseo and this proposed boulevard, the width is — feet. It is funnel-shaped at that point. It is proposed to have driveways for automobiles and other vehicles and wide sidewalks on both sides of this boulevard, and grass plats running through the center. The cost of the grading of this park will equal the sum of \$97,688.90. The great proportion of the population of Kansas City, is far north of Meyer Boulevard, [fol. 15] and far north of Sixty-third Street; the complainant owns the forty (40) acres of ground hereinabove particularly described as tract "A" extending Thirteen Hundred and twenty (1,320) feet south from and Thirteen Hundred and twenty (1,320) feet along Sixty-third Street and at no place fronting on any other street, than



Sixty-third Street, neither does it front said boulevard, but at the closest point is 250 ft. therefrom and at the farthest point six hundred (600) feet therefrom. The complainant's said property and other property in the neighborhood is rural property, almost agricultural in its present condition. Complainant has no improvements upon the aforesaid tract of land designated as "A" and the said land is but vacant farm land.

12. By the aforesaid special assessments it is attempted to put more than two-thirds of the costs of the aforesaid improvement which is most general in its nature and designed for all the people of Kansas City, upon the neighboring property holders (including the complainant) owning land north of the aforesaid improvement; and less than one-third of the cost of said improvement upon the neighboring property holders owning land lying south of said improvement. That the aforesaid benefit district lying north of the aforesaid improvement on the east end thereof extends north 1,388 feet distant from the said improvement and on the west end of the said improvement extends 2,196 feet distant north of the said improvement, and on the west end thereof extends only a distance of 225 feet south thereof, and on the east end thereof extends only a distance of 650 feet south of the said improvement; leaving owners of property at the east end of and on the south side of the said improvement at from a distance of, from 725 feet to a distance of 1,388 feet south from the said improvement, and the property owners at the west end of and south side of said improvement from [fol. 16] a distance of from 225 feet to a distance of 2,171 feet south of said improvement, all totally free, clear and exempt from bearing any part of the expense of the said improvement, when the said lands so kept free and clear and exempt from said improvement received greater direct special benefits on account of said improvement, than the hereinbefore mentioned tract "A" owned by the complainant, against which the aforesaid assessments have been attempted to be made; that the improvements are as shown of the most general character and designed for all of the people of the said Kansas City. At present the said Forty (40) acres of the complainant's are not accessible to said improvement and will not be accessible to said improvement for years to come. It is manifestly an improvement of a general nature and taxes of a special nature are sought to be imposed for the payment thereof, as hereinafter shown, all of which is undertaken to be done under the provisions of the municipal charter of Kansas City hereinabove set out.

13. That said Ordinance No. 21831, and said assessment attempted to be made against said property of said complainant, and said tax bills attempted to be issued against said property of complainant, were and are unconstitutional null and void, for the reason that they and each of them if enforced, will deprive complainant of his property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that the said property although located a great

distance from said boulevard, is, pursuant to said Ordinance, and said assessments, sought to be charged with the same benefits, and in the same proportion as property immediately abutting upon said boulevard, and which is necessarily specially benefited greatly in excess of all property which does not adjoin and abut upon said [fol. 17] boulevard, and especially property located as that of complainant at a great distance from said boulevard, thereby depriving complainant of the equal protection of the law in violation of Section 1 of Fourteenth Amendment to the Constitution of the United States in that said Section 28 of Article VIII, and said Ordinance, and said proceedings hereinabove referred to, do not, and did not, provide, give or grant to this complainant, or his predecessor in title, any opportunity to be heard as to the apportionment of the benefits resulting from the cost of said grading among the various tracts of property in the benefit district, and complainant's predecessor in title and complainant had no notice or opportunity to be heard in relation to the value at which their property was assessed by the city assessor, nor as to the amount of benefits, if any, accruing to it, by reason of said improvements, but that said section of said Charter and said Ordinance provide for an arbitrary and unfair and discriminating method of apportionment as hereinbefore shown, all of which is violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States as hereinabove set forth and for the further reason that no suit or proceeding was instituted in the Circuit Court against the respective owners of the land to be charged with the cost of said work or against this complainant, as required by said Charter and by said Ordinance, as aforesaid.

14. Complainant further states that the pretended benefit district described in and fixed by said Ordinance of Kansas City, No. 21831, was unreasonable, discriminating, arbitrary and unjust, and was such as to place an unconscionable burden and inequitable proportion of the cost of said work upon the land of complainant; a large amount of land, including the said tract of complainant, lying a [fol. 18] long distance north of and not abutting or nearly approaching said Meyer Boulevard, and not especially benefited by the grading of Meyer Boulevard, was included within said benefit district while a large amount of land east and south of said Meyer Boulevard particularly and peculiarly and obviously benefited by the grading of said Meyer Boulevard, was left wholly out of said benefit district and was not assessed at all for such grading. Complainant further states that the benefit district described in said ordinance No. 21831 was limited and confined to a relatively small territory, thereby fixing the improvement of Meyer Boulevard in question as one of a purely local nature and benefit, while, as a matter of fact, the improvement was not of a local nature but was designated to be and is of a general nature and for the general public benefit, as aforesaid. Said Meyer Boulevard is not, in fact, a street or boulevard, but is, in fact, a great and broad parkway varying from two hundred twenty (220) to five hundred (500) feet in width, and

it is not appropriate, necessary or useful to nor a peculiar local benefit to the lands abutting on it or adjacent thereto, or to the lands in said benefit district, the same being unimproved, unplatted suburban lands, as aforesaid. And, although said Meyer parkway is primarily and obviously a benefit to said Swope Park, and to the general public, neither said park lands were assessed anything toward the cost of said grading, although said park lands might, under the charter of Kansas City, have legally been so assessed, nor did the city or general public otherwise contribute or pay any part of the cost of said grading, although such is contemplated by the charter of Kansas City.

15. Complainant further alleges it is an obvious, palpable fact that the owners and occupants of the land lying north of said boulevard [fol. 19] yard, and toward the center of the city, will have practically no use of nor benefit from said boulevard, while the owners and occupants of the land south of said boulevard will have some use of said boulevard as an approach to and from the center of the city. And notwithstanding the obvious fact that the land north of said boulevard has less use of and less benefit from said Meyer Boulevard than the land on the south, the land north of said boulevard was assessed over seventy one thousand dollars (\$71,000.00) or about 73% of the cost of the grading said boulevard, while the land south of said boulevard was assessed only about twenty six thousand (\$26,000.00) dollars, or only 27% of the cost of grading said boulevard.

16. Complainant further states that all the land in said benefit district fixed by said Ordinance No. 21831, is unplatted and unimproved suburban land, there being no house or other improvement fronting on said boulevard and no house or other edifice, except one, in the entire benefit district. The lands in said benefit district are purely acre properties, and are of small value, and the lands that do not abut on said Meyer Boulevard, (and such is the land of complainant), were assessed by the city assessor, as aforesaid, for the purpose of this proceeding, equally as high or higher per acre than the lands abutting upon the boulevard and the apportionment of the assessment of the said cost of grading Meyer Boulevard was land ratably over the lands in said benefit district according to the said assessed value, the result being that lands far removed, much of it more than one-fourth of a mile distant from and north of said Meyer Boulevard, were taxed for said grading, per acre equally with or greater than [fol. 20] the land abutting on said boulevard. None of the lands in the benefit district were laid off into lots and blocks, and so it is true that the land abutting and adjacent to the said boulevard and extending back therefrom to a depth of one hundred fifty (150) feet, which, according to Section 3 of Article VIII of the Charter of Kansas City, should be deemed as the land abutting upon a boulevard and be chargeable with grading costs, was assessed with but approximately twelve thousand dollars (\$12,000.00) or only about 12 per cent of the cost of said grading, while the lands in the benefit district that do not abut on said boulevard or lie within one hundred

fifty feet thereof and are but little, if at all, specially benefited by said grading, were assessed with about eighty-five thousand (\$85,000.00) dollars, or about 88 per cent of the cost of said grading, and thus the land of complainant lying far removed from said boulevard is taxed more than the aggregate of all lands abutting thereon, although no greater in area.

17. Complainant states that the taxing of his lands which are far removed from and have no access to or use of said boulevard, at the same rate as the lands immediately fronting on and particularly benefited by said boulevard, was in violation of said Section 28 of Article VIII of the Kansas City Charter, which requires that the tax for such grading costs shall be laid "in proportion to the benefits accruing to the several parcels of land" in the benefit district and was palpably discriminatory, inequitable and unjust.

18. Complainant states that his said land was assessed in a purely arbitrary, unjust and discriminatory manner and not in accordance with or in consideration of the benefits to said lands by reason of [fol. 21] said improvements, and that the assessments made and tax bills issued against his said land are far in excess of the special benefits, if any, accruing to his land, by reason of such grading, and are so great as to amount to a confiscation of complainant's land.

19. That by Section 28 of Article VIII of Charter of Kansas City, Jackson County, Missouri, and said Ordinance 21831, said assessments attempted to be made against said property of complainant said tax bills attempted to be issued against said property of complainant, were and are unconstitutional, null and void, for the reason that, they and each of them, if enforced will deprive complainant of his property in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States; in that the said property of complainant although located a great distance from said boulevard, is, pursuant to said section of said charter and said Ordinance and said assessments sought to be charged with benefits, while property lying south of that said improvement and nearer than complainant's said property to the said improvement as hereinbefore shown, and therefore necessarily benefited greatly in excess of the aforesaid property owned by the plaintiff is not charged with any part of the cost of the said improvement and thereby the complainant is deprived of the equal protection of the law of Missouri in violation of Section 1 of Fourteenth Amendment of the Constitution of the United States; the said section 28 of Article VIII and said Ordinance and said proceedings hereinbefore referred to did not provide for giving or granting to this complainant or his grantor any opportunity to be heard as to the apportionment of the benefits resulting from the cost of said grading, as to the fact that complainant was being deprived of the equal protection of the [fol. 22] laws of Missouri, as to the fact that Complainant was being discriminated against, as hereinbefore shown in the making and levying of the special benefits to be collected for the payment of

the cost of the aforesaid improvement; but the said Section of the said Charter and said Ordinance provided for an arbitrary unfair and discriminating method of apportionment, all of which was, and is violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States and the complainant or his grantor had no notice of or opportunity to be heard in relation to, the discrimination against complainant's property as herein before shown, all in violation of said Section 1 of said Fourteenth Amendment.

20. That the said defendants threaten to proceed to enforce the said tax bills against the property of complainant and said tax bills do constitute a cloud upon the title of complainant to the said premises:

21. That complainant has no adequate remedy at law.

Wherefore, Complainant prays the court as follows:

1. That a subpoena may issue out of this Honorable Court, directed to said defendants, requiring and commanding them, and each of them, to appear in this court on a day certain, and answer the several allegations in this bill of complaint contained, an answer under oath being hereby expressly waived:

2. That during the pendency of this cause, a temporary injunction be issued against the defendant, and each of them, restraining and enjoining them, and each of them, until further order of this court, from transferring or otherwise disposing of said tax bills, and from enforcing or attempting to enforce the lien of said tax bills against the property of this complainant.

[fol. 23] 3. That on the final hearing of said cause, said tax bills, and each of them, be cancelled and set aside and for naught held, and that the property of this complainant be adjudged and declared to be free of any and all liens on account of said tax bills, and on account of said Ordinance No. 21831, and all proceedings taken thereunder, and from all assessments attempted to be levied or assessed against the property of this complainant pursuant thereto.

4. That complainant have such other and further relief as to the court may seem meet, equitable and proper.

Marley & Reed, Attorneys for Complainant.

STATE OF MISSOURI.

County of Jackson, ss:

Albert S. Marley, of lawful age, being duly sworn, says that he is agent and attorney for the complainant herein, and as such is authorized to and does make this affidavit; that he has read the foregoing Bill of Complaint knows the contents thereof, and the statements therein contained are true to the best of his knowledge and belief.

Albert S. Marley.

Subscribed and Sworn to before me a Notary Public, this 28th day of January, 1920. My Commission expires March 28, 1923 Ernest H. Pendell, Notary Public Within and for said County and State. (Seal.)

Received copy of the within amended bill this 28th of Jan., 1920.  
Bowersock & Fizzell, Attorneys for Def. Fidelity National Bk. & T. Co.

The plat attached to the Bill of Complaint as Exhibit A is the same as Plaintiff's Exhibit 12 introduced at the trial of this cause and same is omitted here for the reason that the original Exhibit is sent to the Court of Appeals pursuant to stipulation of the parties herein. [fol. 24] And afterwards, to-wit, on the 25th day of January, 1921, the Amended Separate Answer of Fidelity National Bank and Trust Company of Kansas City, formerly Fidelity Trust Company, was filed.

Said Answer is in words and figures as follows, to-wit:

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[fol. 25] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI, NOVEMBER TERM, 1920

[Title omitted]

AMENDED SEPARATE ANSWER OF DEFENDANT FIDELITY NATIONAL BANK AND TRUST COMPANY OF KANSAS CITY, FORMERLY FIDELITY TRUST COMPANY, TO FIRST AMENDED BILL OF COMPLAINT—Filed Jan. 25, 1921 .

Comes now Fidelity National Bank and Trust Company of Kansas City, a corporation, formerly Fidelity Trust Company, defendant in the above entitled cause, and by leave of court first had and obtained files its amended separate answer to complainant's first amended bill of complaint herein, and answering said bill of complaint states:

1. Answering paragraph 1 of said complaint defendant states that it is a corporation duly organized and existing under the laws of the United States as a national banking corporation, with its principal office and place of business at Kansas City, in the Western District of Missouri. Defendant is without knowledge as to the residence and citizenship of the other defendant hereto.

2. Defendant admits the allegations of paragraph 2 of said bill of complaint.

3. Defendant admits the allegations of paragraph 3 of said bill of complaint.

4. Defendant admits and alleges the fact to be that in 1908, the City of Kansas City, Missouri, acting pursuant to the constitution



and laws of the State of Missouri, adopted its present charter, pro-[fol. 26] viding in Article VIII, Section 28, as set forth in paragraph 4 of said bill of complaint.

5. Defendant admits and alleges that in January, 1915, the City Council of Kansas City, Missouri, passed and enacted Ordinance No. 21831 as set forth in paragraph 5 of said bill of complaint, and that said Ordinance was approved and became effective January 26, 1915.

6. Defendant admits that Section 28 of Article VIII of the Charter of Kansas City, and Ordinance No. 21831, provide that a proceeding separate from the proceeding providing for in Section 4 of said Ordinance shall be filed in the Circuit Court of Jackson County, Missouri, in the name of Kansas City, and against the respective owners of lands chargeable under the provisions of said charter with the cost of the work, all as set forth in paragraph 6 of said bill of Complaint. Defendant denies the allegations of said paragraph to the effect that no such suit or proceeding was brought or prosecuted as required by said Charter and Ordinance, and that the Board of Park Commissioners was without right or authority to let a contract for said work, and that the Board of Public Works was without right or power to apportion or levy the cost of said work against the lands in the benefit district set forth in said Ordinance, or to issue tax bills for such work against said lands.

7. Defendant admits the allegations contained in paragraph 7 of said bill of complaint, except that defendant is without knowledge as to the present ownership of the lands therein described.

8. Defendant admits and alleges that a judgment was entered in the suit in the Circuit Court of Jackson County, Missouri, referred to in Paragraph 8 of said bill of complaint, finding and adjudging the validity of said Ordinance No. 21831, and of the proposed lien of the assessments for the payment of the cost of the work, all as more fully hereinafter set forth. Defendant denies the other allegations of said paragraph.

[fol. 27] 9. Defendant admits and alleges that on or about October 26, 1915, the Board of Park Commissioners of Kansas City, Missouri, entered into a contract with defendant, McMillan Contracting Company, for the work of grading said boulevard as alleged in paragraph 9 of said bill of complaint.

10. Defendant admits and alleges that the facts, proceedings and things set forth in paragraph 10 of said complaint were actually had and done, and denies that any of said facts, proceedings and things were merely pretended or claimed to have been done.

11. Defendant denies the allegations of paragraph 11 of said bill of complaint.

12. Defendant denies the allegations of paragraph 12 of said bill of complaint.

13. Defendant denies the allegations of fact contained in paragraph 13 of said bill of complaint.

14. Defendant denies the allegations of paragraph 14 of said bill of complaint.

15. Defendant denies the allegations of paragraph 15 of said bill of complaint.

16. Defendant denies the allegations contained in paragraph 16 of complainant's bill.

17. Defendant denies the allegations of fact contained in paragraph 17 of said bill of complaint.

18. Defendant denies the allegations contained in paragraph 18 of said bill of complaint.

19. Defendant denies the allegations of fact contained in paragraph 19 of said bill of complaint.

20. Defendant denies the allegations contained in paragraph 20 of complainant's bill, but alleges that the tax bills in question constitute a valid and existing lien against complainant's lands.

[fol. 28] 21. Defendant denies that complainant has no adequate remedy at law.

22. And for further answer to said bill of complaint defendant states that on or about February 17, 1915, the proceeding provided for in Section 8 of said Ordinance No. 21831, and in Section 28 of Article VIII of said Charter, referred to in paragraph 6 of complainant's bill, was duly filed in the Circuit Court of Jackson County, Missouri, at Kansas City, being cause No. 90628 in said Court; that in said proceeding service was duly had according to law on all of the owners of the lands within the benefit district described in said Ordinance, and on all parties interested in said proceeding; that a hearing was duly had therein, of which complainant herein, or his grantor, had actual notice, and at which he, or said grantor, appeared, and that on May 17, 1915, a judgment was duly entered in said cause finding and adjudging that said Ordinance No. 21831 is valid and legal, and that the contract for the doing of the work provided for therein might be entered into by Kansas City in conformity with said Ordinance, and that the proposed lien of the assessments for the payment of the cost of said work against the respective lots, tracts and parcels of land within the benefit district described in said Ordinance and against the respective lots, tracts and parcels of land owned by the respective defendants in said proceeding, and each of them respectively, when assessed, apportioned and charged as provided in said Ordinance and said charter is and shall be a valid and legal lien: that no appeal was taken from said judgment, and that the same became and is final and binding; that thereafter the Board of Park Commissioners of Kansas City duly entered into a contract with McMillan Contracting Company for the work of grad-



ing said boulevard, and that thereafter Ordinance No. 24693, entitled: "An ordinance providing for and authorizing the work of Grading Meyer Boulevard from the west line of Swope Parkway to the east line of the Paseo, stating the nature of the improvement, [fol. 29] how the cost thereof shall be paid and how the assessments therefor shall be made and levied, and ratifying, approving and confirming a contract therefor with the McMillan Contracting Company," was duly passed by the Common Council of Kansas City, Missouri, and duly approved by the Mayor on December 9, 1915; that thereafter all the proceedings necessary and proper for the issuance of the tax bills described in complainant's bill of complaint were duly and legally had, and that said tax bills were duly issued in accordance with law.

Defendant states that all of the proceedings aforesaid were regular and legal; that said tax bills are a valid lien on the lands described herein; that all questions involved in said proceeding in the Circuit Court of Jackson County, Missouri, at Kansas City were finally adjudged and decreed therein, and that such final adjudication is in full force and effect, is binding upon complainant herein and is a bar to this action.

Defendant states that the complainant herein had notice of the pendency of the proceedings above referred to to charge the lands described in said bill of complaint with the lien of said special tax bills, and that throughout all of said proceedings and the doing of said work, said complainant, or his grantor, was in possession of said lands and received and is now receiving the benefits of said work, and that it is contrary to equity and good conscience for complainant, at this late date, and after the completion of said work, and the issuance and sale of said tax bills, to attack the validity of said proceedings and of said tax bills.

Defendant states that in the action or actions to enforce said tax bills complainant will have an adequate opportunity to be heard on any questions complained of herein and not heretofore finally adjudged.

Wherefore, defendant prays that complainant take nothing herein and that defendant go hence without day and recover its costs [fol. 30] herein incurred and expended, and for such other and further relief as to the court may seem equitable and just.

Bowersock & Fizzell, Attorneys for Defendant Fidelity National Bank and Trust Company of Kansas City.

Received copy of the above and foregoing amended answer, and consent to the filing thereof, this 24<sup>th</sup> day of January, 1921.

Marley & Reed, Attorneys for Complainant.

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[fol. 31] And afterwards, to-wit, on the 7th day of July, 1921, Final Decree was filed and entered of record in words and figures as follows:

[fol. 32] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
WESTERN DIVISION OF THE WESTERN DISTRICT OF  
MISSOURI

[Title omitted]

FINAL DECREE—Filed July 7, 1921

This cause, having been heretofore submitted to and heard by the court, upon the pleadings and the evidence and having been by the court taken under advisement, now comes on for further hearing at this term, and the court having weighed and considered all of the evidence, and having examined and considered the briefs and arguments of counsel for complainant and defendants, and having been fully advised in the premises, doth find that the complainant is entitled to the relief prayed for in his bill of complaint herein.

Wherefore, it is by the court, considered, ordered, adjudged and decreed as follows:

1. That Special Tax Bill No. 11, for the sum of \$12,511.60 dated on or about the 21st day of November, 1916, issued by Kansas City, Missouri, to McMillan Contracting Company pursuant to Ordinance of Kansas City, Missouri, No. 21831, approved January 26th, 1915, and Ordinance No. 24693, approved December 9th, 1915, for the grading of Meyer Boulevard, against and upon the tract of land belonging to complainant, B. Haywood Hagerman, described as follows, to-wit:

"That part of the Northwest Quarter ( $\frac{1}{4}$ ) of the Southwest Quarter ( $\frac{1}{4}$ ) of Section Three (3), Township Forty-eight (48), Range [fol. 33] Thirty-three (33), lying south of the south line of 63rd Street and east of the east line of Prospect Avenue, except part in South Benton as established by Ordinance No. 21469, approved January 12th, 1915, in Kansas City, Jackson County, Missouri.

be and the same is hereby cancelled, set aside and for naught held and esteemed.

2. That the above described real estate be and the same is hereby forever discharged of and declared to be forever free of, any and all liens of, or on account of said tax bill and interest thereon and also on account of said Ordinances of said Kansas City, Missouri, numbered 21831, and numbered 24693, and all proceedings taken under the said Ordinances and all assessments attempted to be levied or assessed against said real estate pursuant thereto.

3. That the complainant have and recover of and from the defendant, Fidelity National Bank and Trust Company of Kansas City, a corporation, all of his costs herein incurred and expended.

To which finding, judgment and decree, and each and every part thereof, the defendants and each of them hereby except.

Arba S. Van Valkenburg, District Judge. Dated July 7/21.

[fol. 34] And afterwards, to-wit, on the 4th day of January, 1922, Petition for Appeal and Assignment of Errors was filed.

Also on the same date an Order Allowing Appeal was filed and entered of record.

Said Petition for Appeal, Assignment of Errors and Order Allowing Appeal are in words and figures as follows, to-wit:

[fol. 35] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
WESTERN DIVISION OF THE WESTERN DISTRICT OF  
MISSOURI

[Title omitted]

PETITION FOR APPEAL—Filed Jan. 4, 1922

To the Honorable Arba S. Van Valkenburgh, District Judge:

The above named defendants, McMillan Contracting Company, a corporation, and Fidelity National Bank and Trust Company of Kansas City, a corporation, feeling themselves aggrieved by the decree made and entered in this cause on July 7, 1921, do hereby appeal from said decree to the Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and they pray that their appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

And your petitioners further pray that the proper order be made touching the security to be required of them to perfect their appeal.

Bowersock & Fizzell, Justin D. Bowersock, Robert B. Fizzell,  
Attorneys for Defendants.

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Allowed Jan'y 4/22. Arba S. Van Valkenburgh, Judge.

[fol. 36] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
WESTERN DIVISION OF THE WESTERN DISTRICT OF  
MISSOURI

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Jan. 4, 1922

Come now Fidelity National Bank and Trust Company of Kansas City and McMillan Contracting Company, defendants above

named, and respectfully state that the order and decree made and entered in the above entitled cause on July 7, 1921, cancelling the tax bills involved in this action, is erroneous and unjust to said defendants for the following reasons:

1. The court erred in not finding and holding that the provisions of Section 28 of Article 8 of the Charter of Kansas City, Missouri, had been complied with in the matter of the suit required by that Section to be filed in the Circuit Court of Jackson County, Missouri, and in all other matters required by that section.
2. The court erred in not finding and holding that the judgment in the suit filed in the Circuit Court of Jackson County, Missouri, under the provisions of said Section 28, was and is res adjudicata as to the propriety and reasonableness of the benefit district fixed by Ordinance Number 21831, as to the method of apportionment and as to all other matters that were or might have been litigated therein.
3. The court erred in ruling that the benefit district was arbitrary and unreasonable.
4. The court erred in ruling that the assessment was arbitrary and unreasonable.
5. The court erred in holding that the tax bills involved in this action exceeded the special benefits received by the lands in question.
6. The court erred in holding that the tax bills unreasonably exceeded the benefit or any possible benefit to the lands in question.
- [fol. 37] 7. The court erred in holding that the improvement in question was in its nature a general public improvement, rather than a local improvement.
8. The court erred in holding that the method of apportionment within the benefit district was arbitrary and unreasonable.
9. The court erred in decreeing that the tax bills were null and void and that the land in question be released from said tax bills.
10. The court erred in making any finding as to the relation between the amounts of the tax bills in question and the values of the lands in controversy, for the reason that there was no competent evidence as to such values.
11. The court erred in holding the amounts of the tax bills in question to be unreasonable or confiscatory for the reason that there was no competent evidence as to the values of the lands in controversy.
12. The court erred in making any finding as to the extent of the special benefits received by the respective tracts, for the reason that

there was no competent evidence as to such benefits, and erred in admitting any evidence on that issue.

13. The court erred in determining the validity of the tax bills in question upon the relation between the amount of each tax bill and the extent of the special benefit to the respective tract covered by such bill.

Wherefore, said defendants prays that said order and decree be reversed and that an order be entered denying the relief prayed for in the bill of complaint herein.

Bowersock & Fizzell, Justin D. Bowersock, Robert B. Fizzell,  
Attorneys for Defendants.

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[fol. 38] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
WESTERN DIVISION OF THE WESTERN DISTRICT OF  
MISSOURI

[Title omitted]

ORDER ALLOWING APPEAL—Filed Jan. 4, 1922

Now, on this 4th day of January, 1922, there having been presented to me the petition of McMillan Contracting Company, a corporation, and Fidelity National Bank and Trust Company of Kansas City, a corporation, defendants herein, praying that they be allowed an appeal to the United States Circuit Court of Appeals from an order and decree made and entered herein on July 7, 1921.

It is ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from said order and decree be and the same is hereby allowed, and that a certified copy of all records, proceedings and papers herein be forthwith transmitted to said United States Circuit Court of Appeals for the Eighth Circuit, upon the said defendants giving bond conditioned as required by law, in the sum of Five Hundred (\$500.00) Dollars.

Arba S. Van Valkenburgh, District Judge.

[fol. 39] And afterwards, to-wit, on the 4th day of January, 1922, Election as to printing of record on appeal was filed.

Said Election as to printing is in words and figures as follows, to-wit:

[fol. 40] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
WESTERN DIVISION OF THE WESTERN DISTRICT OF  
MISSOURI

[Title omitted]

ELECTION TO HAVE RECORD PRINTED IN CIRCUIT COURT OF APPEALS  
—Filed Jan. 4, 1922

Come now Fidelity National Bank and Trust Company of Kansas City, a corporation, defendant in the above entitled cause, and McMillan Contracting Company, a corporation, defendant above named, by their attorneys, and hereby file their election to have printed under the supervision of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, the transcript of the record in the appeal of said McMillan Contracting Company, a corporation, and Fidelity National Bank and Trust Company of Kansas City, a corporation, from the order and decree of the District Court made and entered in the above-entitled cause on July 7, 1921.

Bowersock & Fizzell, Justin D. Bowersock, Robert B. Fizzell,  
Attorneys for Defendants.

[fol. 41] And afterwards, to-wit, on the 6th day of January, 1922, Bond for Appeal was filed and approved by the Court.

Said Bond for Appeal, together with the approval thereof, is in words and figures as follows, to-wit:

[fols. 42 & 43] IN THE DISTRICT COURT OF THE UNITED STATES FOR  
THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI

[Title omitted]

BOND FOR APPEAL—Filed and Approved Jan. 6, 1922 [for \$500;  
omitted in printing]

[fol. 44] And afterwards, to-wit, on the 13th day of February, 1922, Notice of lodging Condensed Statement of Evidence with the Clerk of the Court was filed.

Said Notice is in words and figures as follows, to-wit:

[fol. 45] IN THE UNITED STATES CIRCUIT COURT OF APPEALS,  
EIGHTH CIRCUIT

[Title omitted]

NOTICE—Filed Feb. 13, 1922

To the above-named plaintiff or to Marley & Reed, his attorneys of record:

You are hereby notified that defendants have prepared and filed in the office of the Clerk of the above named court a condensed statement of the testimony introduced at the trial of the above entitled cause, pursuant to Equity Rule 75-B, and that on Monday, the 27th day of February, 1922, at 10 o'clock A. M., defendants will ask the judge of the above named court to approve said statement, and that on said day defendants will apply for an order making said statement a part of the record in this cause, for the purpose of the appeal from the judgment herein, to the United States Circuit Court of Appeals for the Eighth Circuit.

Bowersock & Fizzell, Miller, Camack, Winger & Reeder,  
Clarence S. Palmer, Attorneys for Defendants.

Received copy of the above and foregoing notice this 13th day of February, 1922.

Marley & Reed, Attorneys for Plaintiff.

[fol. 46] And afterwards, to-wit, on the 13th day of February, 1922, the Condensed Statement of Testimony introduced at the trial was filed.

Said Condensed Statement of Testimony is in words and figures as follows, to-wit:

[fol. 47] IN THE UNITED STATES CIRCUIT COURT OF APPEALS,  
EIGHTH CIRCUIT

[Title omitted]

Condensed Statement of Testimony—Filed Feb. 13, 1922

Prepared by Appellants in Accordance with Equity Rule No. 75-b

This suit was instituted on the 14th day of May, 1919, in the District Court of the United States for the Western Division of the Western District of Missouri, for the cancellation of certain special tax bills issued by Kansas City, Missouri.

Thereafter at the November 1920 term of said court and on the 28th day of January, 1921, at 10:00 o'clock a. m., the above entitled cause came on for hearing before the Honorable Arba S. Van Valkenburgh, Judge of said Court, and was tried in conjunction with two other cases brought for the cancellation of similar special tax bills, to-wit: Felix H. Swope and Gertrude M. Brown v. Fidelity National Bank and Trust Company, Standard Investment Company, Silas C. De Lap, Hunter M. Meriwether and Gilmer Meriwether, Number 215; and Walter L. Abernathy and Carrie S. Abernathy v. McMillan Contracting Company and Fidelity National Bank and Trust Company, Number 163. All parties agreed that the three cases should be tried together and that the evidence offered should bear upon the issues of each case, so far as applicable.

The plaintiff in the above entitled cause was represented by A. S. Marley, his counsel. In the case of Felix H. Swope, et al. v. Fidelity National Bank and Trust Company, et al., plaintiffs were [fol. 48] represented by Elliott H. Jones, of Scaritt, Jones, Seddon & North, their counsel. In the case of Walter L. Abernathy, et al. v. McMillan Contracting Company, et al., Messrs. O. H. Dean, H. M. Langworthy, and Roy Thomson of Warner, Dean, Langworthy, Thomson & Williams, represented the plaintiffs. Messrs. Justin D. Bowersock, Robert B. Fizzell and Guy Vernon Head, of Bowersock & Fizzell, and Messrs. Maurice H. Winger and Frank P. Barker, of Miller, Camack, Winger & Reeder, and Clarence S. Palmer, represented the defendants in all three cases.

Thereupon the following proceedings were had:

Plaintiff to sustain the issues on his part offered and introduced evidence, oral and documentary, as follows:

Section 28 of Article 8 of the Charter of Kansas City, Missouri, was introduced in evidence by the complainant, and is set forth here in full as follows:

[fol. 49]

EXHIBIT IN EVIDENCE

Section 28. Grading, etc.—When Too Heavy Burden on Benefit District, as Limited in Section 3 of This Article—Benefit Limits May Be Determined by Ordinance.—When in grading or regrading any street, avenue, highway, or part thereof, a very large or un-



usual amount of filling in or cutting or grading away of earth or rock be necessary, necessitating an expense of such magnitude as to impose too heavy a burden on the land situate in the benefit district as limited in Section three of this article, and when in grading or regrading, constructing or reconstructing any street, avenue, highway or part thereof, one or more bridges, viaducts, tunnels, subways, cuts or approaches on, along, over or under the same is or are required or needed, the cost of grading or regrading such street, avenue, highway, or part thereof, including the cost of constructing or reconstructing such bridges, viaducts, tunnels, subways and approaches, or any of them, may be charged as a special tax on parcels of land (exclusive of improvements) benefited thereby, after deducting the portion of the whole cost, if any, which the city may pay, and in proportion to the benefits accruing to the said several parcels of land, exclusive of improvements thereon, and not exceeding the amount of said benefit, said benefits to be determined by the Board of Public Works as hereinafter provided, and the limits within which parcels of land are benefited shall in all such specified instances be prescribed and determined by ordinance. If the Common Council shall find and declare in the ordinance providing for the doing of the work above described that a very large or unusual amount of filling in or cutting or grading away of earth or rock is necessary, necessitating an expense of such magnitude as to impose too heavy a burden on the land situate in the benefit district as limited in Section three of this article, or that in grading or regrading, constructing or reconstructing any street, avenue, highway, or part thereof, one or more bridges, viaducts, tunnels, subways, cuts or approaches on, along, over or under the same is, or are required or needed, the finding and declaration in said ordinance shall be final and conclusive as to all such matters.

**Public Works Shall be Provided for by Ordinance—Proceedings in Circuit Court Against Owners—Petition to Contain, What.—**The Public Work described above shall be provided for by ordinance, and the city may provide that after the passage of the ordinance and after an approximate estimate of the cost of the work shall have been made by the Board of Public Works, the city shall file a proceeding in the Circuit Court of Jackson County, Missouri, in the name of the city, against the respective owners of land chargeable under the provisions of this section with the cost of such work. In such proceeding the city shall allege the passage and approval of the ordinance providing for the work, and the approximate estimate of the cost of said work; and shall define and set forth the limits of the benefit district, prescribed by the ordinance, within which it is proposed to assess property for the payment of said work. The prayer of the petition shall be that the court find and determine the validity of said ordinance, and the question of whether or not the respective tracts of land within said benefit district shall be charged with the lien of said work in the manner provided by said ordinance.

**Process—What Parties May Offer in Evidence.—**Service of process in such proceeding shall be governed by the provisions of Section

eleven (11) of Article thirteen (XIII) of this Charter, relating to service of notice and summons in proceedings for the ascertainment of benefits and damages for the condemnation of lands for parks and boulevards. In such proceedings, the city shall have the right to offer evidence tending to prove the validity of said ordinance, and said proposed lien against the respective lots, tracts and parcels [fol. 51] of land within said benefit district sought to be charged with such lien; and the respective owners of lots, tracts and parcels of land within said benefit district shall have the right to introduce evidence tending to show the invalidity or lack of legality of said ordinance, and said proposed lien against the respective lots, tracts, and parcels of land owned by each respective defendant; and the court shall have the right to determine the question of whether or not the said lots, tracts and parcels of land owned by each defendant should be charged with such lien.

**Trial—Judgment.**—The trial of such proceedings shall be in accordance with the Constitution and Laws of the State, and the court shall render judgment either validating such ordinance, and proposed lien against the lots, tracts and parcels of land within said benefit district or against such lots, tracts or parcels of land within said benefit district or against such lots, tracts, or parcels of land as the court may find legally chargeable with the same, or the court may render judgment that such ordinance or proposed lien are, in whole or in part, invalid and illegal.

**Appeal—What Court Shall Determine.**—Any appeal taken from such judgment must be taken within ten days after the rendition of such judgment, or if a motion for a new trial be filed therein, then within ten days after such motion may be overruled or otherwise disposed of; but in all other respects the rules covering such appeal shall be the same as provided by Section eighteen (18) of Article thirteen (XIII) of this Charter.

**No Appeal, or After Determination of, City May Enter Into Contract, etc.**—If no appeal shall be taken, or after the determination of such appeal, the city may enter into a contract with the successful bidder to whom such work may be let; and, after the work under such contract shall have been fully completed, the estimate of cost thereof, and the apportionment of the same against the various lots, tracts and parcels of land within the benefit district, shall be [fol. 52] made by the Board of Public Works according to the assessed value thereof, exclusive of improvements, with the assistance of the City Assessor as provided in Section three of this article, and all of the provisions of Section three of this article relating to the apportionment of special assessments, and the levy, issue and collection of special tax bills as in grading proceedings as in said section specified, shall apply to special tax bills issued pursuant to this section, except that said tax bills may be made payable in not to exceed ten annual installments; the number of installments, and the times when payable to be determined by the Common Council on the recommendation of the Board of Public Works, such determination to be determined in the ordinance of the Common Council in which said work is authorized and the proceedings thereof instituted.

**Meaning and Intent of This Section.**—Nothing in this section stated shall in anywise affect, modify or change the provisions of the previous sections of this article, or in any manner affect or change the proceedings and remedies therein set forth for the doing of public work and the payment therefor by the issue of special tax bills; the intention of this section being to provide an independent and separate method of public improvements made under the provisions of this section.

[fol. 53] Section 3 of Article VIII of the Charter of Kansas City, Missouri, which is referred to in Section 28 of Article VIII, *supra*, was also offered in evidence, and is in words and figures as follows:

[fol. 54]

#### EXHIBIT IN EVIDENCE

**Section 3. Improvements and Repairs—Resolution of Board of Public Works—What it Shall State.**—All proceedings to improve streets, avenues, alleys, sidewalks and public highways of every character, and parts thereof, within the city, by grading, re-grading the same, paving or re-paving the same, with any material, macadamizing or re-macadamizing or oiling the same, constructing or reconstructing the same, curbing or re-curbings the same, guttering or re-guttering the same, or repairing the same, constructing bridges, viaducts, tunnels, subways or cuts along or under the same and the maintenance and repair of any or all of such improvements during a stated term of years, and by sodding, re-sodding and the planting or re-planting of trees and maintaining them for a term of years along the same, or along any part thereof, excepting boulevards under park commissions, or a proceeding for constructing or reconstructing public, district or joint district sewers, shall be begun by the adoption of a resolution by the Board of Public Works, which resolution shall state the nature of the improvement and when the same is to be paid for in whole or in part in special tax bills, the method of making assessments to pay therefor.

**Hearing, Notice of.**—After the adoption of any such resolution the Board of Public Works shall, by order, fix a day upon which a hearing in respect to such improvement shall be had, which day shall be within thirty days after the date when such order is made, and shall cause to be published for ten days in the newspaper at the time doing the city printing, and if there is no such paper, then in any other newspaper published in the city, a notice directed to the property owners interested in the improvement without naming them, which notice shall recite the substance of the resolution and that a hearing will be had by the said board at their office concerning the [fol. 55] proposed improvement, and the date upon which the hearing shall be had.

**Property Owners to Present Views—Paving.**—On the date fixed for such hearing any and all property owners interested in such improvement may, by written petition, or otherwise, present their

views in respect to the proposed improvement to the said board, and the said board may adjourn the hearing from time to time. After such hearing, if the said board shall determine that it is not for the public interest that the proposed improvement, or a part thereof, be made and paid for, either out of the general fund or by any method of assessment, they shall make an order to that effect, and thereupon the proceedings for the improvement, or part thereof determined against by such order, shall stop and shall not be begun again until the adoption of a new resolution.

**Remonstrance.**—In case the improvement or part thereof consists of paving or re-paving, macadamizing or re-macadamizing the roadway of a street, avenue, alley or part thereof, which shall not have been found and declared to be used and occupied for business purposes, as hereinafter specified, and the resident owners of the city owning a majority of the front feet of all the lands belonging to such residents and fronting on the street, avenue, alley or part thereof to be paved or macadamized, shall file with the said board, on or before the day fixed for such hearing, a remonstrance against such paving or macadamizing, the power of the board to make the improvement shall cease for the period of six months from the date of filing of such remonstrance, after the lapse of which period the proceeding may be begun by the adoption of a new resolution.

**Finding and Declarations of Common Council, Effect of.**—In case the proposed improvement consists of paving or re-paving, macadamizing or re-macadamizing as aforesaid, then, in that event, upon the unanimous recommendation of the Board of Public Works, if each house of the Common Council shall, by ordinance, find and declare a vote of two-thirds of the members-elect of each house that [fol. 56] the street, avenue, alley, public highway, or part thereof, on which the proposed improvement is to be made is used or occupied for business purposes, and that the improvement has been unanimously recommended by the Board of Public Works, such finding and declaration shall be final and conclusive for all purposes, and no special tax bills that may be issued to pay for the work shall be held invalid or affected for the reason that the work for which they may have been issued was not unanimously recommended by the Board of Public Works, or that such street, avenue, alley, public highway or part thereof was not in fact used or occupied for business purposes, and the improvement shall proceed regardless of any remonstrance.

**Improvements Arrested, Proceedings.**—After the expiration of the respective periods during which an improvement may be arrested, as aforesaid, a proceeding may be begun and carried forward for the improvement so determined against or remonstrated against as though no former proceedings had been begun. If no such determination against the improvement is made, or if only a part of the proposed improvement be determined against by said board, the said board shall adopt and perfect plans and specifications for the proposed improvement not determined against, and for an improvement of the same general nature, including, as they deem proper, provisions for the maintenance thereof for a stated period, and in

case a macadam or gravel street roadway pavement is provided for, there may be included as an essential part of maintenance thereof specifications for the rolling and oiling of such pavement at intervals during a stated period.

**Advertising for Bids—Contract Confirmed by Ordinance.**—After the passing of such resolution and the adoption of such plans and specifications, the Board of Public Works shall advertise for bids for the doing of the work by publication for not less than five days, and shall let the contract to the lowest and best bidder therefor, and [fol. 57] shall cause the contract so let to be formally executed by the contractor and by said board on behalf of the city, and the same, before it shall be binding and effective, shall be ratified, approved and confirmed by an ordinance of the said city, as hereinafter specified, and when so ratified, approved and confirmed shall in all respects be considered and held to have been authorized by the city.

**Board May Rescind Before Confirmation of Contract—Completion of Work—Time Extended.**—The Board of Public Works, at any time before any contract is so ratified, approved and confirmed, may rescind by an order entered on the records of said board, the action of said board in signing said contract in behalf of the city, and thereupon all proceedings had in relation to such proposed improvement shall be null and void. The city shall have power, by ordinance, for any good cause, to extend the time of the beginning or of the completion of the work under any such contract, and an ordinance of the city purporting to extend the time therefor shall be conclusive evidence of the existence of good cause for extension. But all such ordinances for extensions must have endorsed thereon the approval of the Board of Public Works; and said board shall not endorse said approval until the City Engineer shall file with said board his verified certificate stating the reasons for granting such extension, and that said extension is made in good faith for the reason therein specified, and for none other.

**When Cost Paid by Special Tax Bills.**—The ordinance ratifying, approving and confirming the contract as above provided for shall also provide for and authorize the improvement, and shall state the nature of the improvement, and this may be done by a reference to the plans and specifications therefor, and such ordinance shall state how the cost thereof shall be paid; that is, whether the cost thereof is to be paid by the issuance of special tax bills, or out of [fol. 58] the general fund, or whether by one method or the other, in whole or in part, and if by the issuance of special tax bills, how the assessments therefor shall be made and levied. The said board shall endorse their approval on the ordinance. The Common Council may amend such ordinance by altering the limits of a proposed benefit district in all cases where the dimensions and boundaries of such district are not specifically defined by this Charter but may not make any other amendment, and shall pass or reject the same.

**Assessment, how Made.**—When the cost of the whole or any part of the improvement referred to in this section is to be paid by special tax bills evidencing assessments against lands, such assessments shall be made, levied and assessed according to one of the methods in this

Article prescribed. Such method shall be specified in the resolution of the Board of Public Works and also in the ordinance confirming the contract for doing the work. In making assessments to pay for work other than for grading or re-grading, and other than for constructing district sewers and joint district sewers, the Board of Public Works shall compute the cost thereof and apportion the same among the several tracts or parcels of land to be charged therewith, and charge each lot or parcel of land with its proper share of such cost according to the frontage of such land on the street, avenue, alley or highway, or part thereof, named in the contract for the doing of the work. In making assessments for special tax bills to pay for grading or re-grading any street, sidewalk, avenue or public highway, or part thereof, the City Assessor shall, on demand of the Board of Public Works, cause an assessment to be made of the value of all the lands to be charged with the cost of such grading or re-grading, exclusive of the improvements thereon, and shall deliver such assessment to the Board of Public Works, who shall compute the cost of such grading or regrading and apportion such cost among [fol. 59] the several lots or parcels of land to be charged, according to the value thereof, fixed by the City Assessor as aforesaid, and charge each lot or parcel of land with its proper share of such cost.

**Grading Cost, How Apportioned.**—When the work of grading or re-grading streets, avenues or public highways is to be paid for in special tax bills, the cost shall be apportioned and paid as follows: The cost of all grading, including the grading of sidewalks, shall be charged as a special tax on all lands on both sides of the street, avenue or public highway, or part thereof, graded within the following limits, viz: In case the land fronting on the street, avenue or public highway, or part thereof, graded, be laid off in lots or blocks, property so laid off from the line of the street, avenue or public highway, or part thereof, graded, back to the center line of the block or blocks, shall be so charged, whether fronting on the street, avenue or public highway or not; nevertheless, the Common Council shall have power by ordinance to prescribe that such lands shall not be charged beyond the alleys in such blocks, if deemed just and equitable, and in case any land fronting on such street, avenue or public highway, or part thereof, graded, be not laid off into lots or blocks, then the land not so laid off, and the land in the rear thereof on the line of the street, avenue or public highway, or part thereof, graded, back one hundred and fifty feet, shall be so charged, whether fronting on the street or not; and land liable for such grading shall be charged according to the value thereof, exclusive of improvements thereon, as herein provided; and in case of question on the part of the assessor or Board of Public Works as to whether any lands fronting on the street, avenue or public highway, or part thereof, be laid off into lots or blocks, or not, within the meaning of this section, the common council shall, on the request of the assessor or Board of Public Works, in making out special tax bills and charging the lands for such grading, determine whether or not, any particular land or lands fronting on the [fol. 60] street, avenue, public highway, or part thereof, graded to



be laid off or not into lots or blocks within the meaning of this section, and such determination shall be conclusive on all parties interested for all purposes. The cost of all work on any sidewalk, including curbing and guttering along the side thereof, exclusive of the grading of the same, shall be charged as a special tax upon the adjoining lands according to the frontage thereof on the sidewalk. The cost of all work mentioned in this section of this article done on spaces fronting on any other street, avenue, alley or public highway, shall be deemed part of the costs of work done on other spaces under the same ordinance and contract, and be charged and paid for accordingly.

**Tax Bills Against Corner Lots—Contracts for Different Kinds of Work.**—In making out special tax bills against corner lots for work on sidewalks, other than grading, and for work of curbing, they shall be charged for work on both fronts and on the outside corners. A single contract may be let and entered into to do various kinds of work when payment is to be made therefor in special tax bills, and when any kind of work shall be fully completed, tax bills therefor may be issued; but in case of a general contract for repairs, as provided in Section 16 of this Article, tax bills may be issued from time to time as separate jobs of repairing may be done.

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[fol. 61] B. W. GANTT, being duly sworn testified: That he was deputy City Clerk of Kansas City, Missouri and as such identified Ordinance of Kansas City, Missouri, No. 21831, the original of which ordinance was marked as Plaintiffs' Exhibit 1 and introduced in evidence.

Said Plaintiffs' Exhibit 1 is substantially as follows:

PLAINTIFFS' EXHIBIT NO. 1 TO GANTT'S TESTIMONY

[fol. 62]

Ordinance No. 21831

An Ordinance to Grade Meyer Boulevard from the West Line of Swope Parkway to the East Line of the Paseo and to Condemn Easements to Support Embankments or Fills, Describing the Nature of the Improvement, Providing How the Cost Thereof Shall be Paid, and Prescribing the Limits Within Which Private Property is Deemed Benefited by the Proposed Improvement, and Assessed and Charged to Pay Damages Caused by said Grading, and by the Condemnation of said Easements, and Assessed and Charged to Pay the Cost of said Improvement.

Whereas, The Board of Park Commissioners has, by Resolution No. 1762, adopted on the 11th day of December, 1914, recommended to the Common Council of Kansas City that Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, be graded to the full width thereof, and to the established grade of the

same, and that easements to support embankments or fills be condemned, and

Whereas, The Board of Public Works, by its Resolution under Entry No. 73992, on the 11th day of December, 1914, has joined in said recommendation, Now, Therefore,

Be it ordained by the Common Council of Kansas City:

Section 1. That the boulevard or highway known and designated as Meyer Boulevard from the West line of Swope Parkway to the east line of The Paseo, be graded to the full width thereof and to the established grade of the same.

Section 2. That as the proposed grading of said Meyer Boulevard, or part thereof, to the established grade for the full width thereof will cause certain embankments or fills to be made leaving abutting property below the proposed grade of said boulevard or highway, there is hereby condemned in said abutting property easements or right to support said embankments or fills so far as may be necessary to bring the said boulevard or highway to the required grade, and by allowing the material of which said embankments are made to fall upon the abutting land at the natural slope so that the surface of the boulevard or highway may be graded to the full width thereof. The areas of land in which said easements are condemned are shown in the plat forming part of the plans hereinafter referred to in Section 3 hereof, prepared and on file in the office of the Board of Park Commissioners, showing a profile of the portion of said Boulevard or highway proposed to be graded and indicating thereon approximately the amount of the encroachment of the embankment upon the abutting property, which said plat is hereby referred to and identified. Just compensation for the easements herein condemned shall be assessed, collected and paid according to law.

Section 3. Said work and improvements shall be of the nature described and specified in, and shall be in accordance with, the plans and specifications, adopted, perfected and approved by the Board of Public Works, on the 11th day of December, 1914, by Resolution under its entry Number 73991, and by the Board of Park Commissioners of Kansas City, Missouri, on the 11th day of December, 1914, under Resolution No. 1761, which said plans and specifications are now on file in the office of said Board of Park Commissioners. Said improvement is hereby provided for and authorized.

[fol. 63] Section 4. Whereas, private property may be disturbed or damaged by the grading herein provided for and authorized and by the condemnation of the easements herein provided for, and the owners thereof lawfully entitled to remuneration or damages under the constitution of this state have not waived all right or claim thereto, it is ordered that proceedings to ascertain and assess all such damages or remuneration be begun and carried on as provided by Article VII of the Charter of said City; and the Common Council prescribes and determines the limits within which private property is deemed benefited by the proposed grading and improve-



ment herein provided, and within which said property may be assessed or charged to pay such remuneration or damages, including the taking and damaging of private property for public use for or in the acquiring of said easements, to be as follows, to-wit:

(Here follows designation of the limits of the benefit district as shown in Plaintiff's Exhibit No. 12.)

Section 5. The Common Council hereby finds and declares that in the grading of said boulevard or highway a very large or unusual amount of filling in, or cutting or grading away of earth or rock is necessary, necessitating an expense of such magnitude as to impose too heavy a burden on the land situate in the benefit district as limited in Section 3 of Article VIII of the Charter of Kansas City.

Section 6. The cost of grading said boulevard or highway as provided herein, shall be charged as a special tax on parcels of land (exclusive of improvements) benefited thereby after deducting the portion of the whole cost, if any, which the city may pay, and in proportion to the benefits accruing to the said several parcels of land, exclusive of improvements thereon, and not exceeding the amount of said benefits, said benefits to be determined by the Board of Public Works and after said work shall have been fully completed, the cost thereof shall be estimated by the said Board of Public Works and shall be apportioned by said Board of Public Works against the various lots, tracts and parcels of land within the benefit district, according to the assessed value thereof, exclusive of improvements, as provided in Section 28, of Article VIII of the Charter of Kansas City aforesaid; and the limits within which parcels of land are benefited as aforesaid, and within which it is proposed to assess property for the payment of said work and improvement, are hereby prescribed and determined to be the same limits as are hereinbefore, in Section 4 of this Ordinance, prescribed and determined as the limits within which private property is deemed benefited by the proposed grading of said boulevard or highway, all in pursuance of Section 28 of Article VIII of the Charter of Kansas City, aforesaid.

Section 7. Payment of the cost of all of said work shall be made in Special Tax Bills evidencing special assessments made and levied against each lot or parcel of land chargeable therewith respectively, and set forth in Section 6 of this Ordinance. Said Tax Bills shall be payable in ten (10) annual installments according to law, the first of said installments to become due and collectible as provided in Section 25 of Article VII of the Charter of Kansas City aforesaid, in the case of Tax Bills payable in installments, and the remaining installments shall be due and collectible, one each year thereafter, on the 30th day of June of each year until all said installments are paid.

[fol. 64] The Common Council hereby finds and declares that its action herein has been recommended by the Board of Public Works and also by the Board of Park Commissioners.

The improvement provided for herein the Common Council deems necessary to have done, but the passage of this Ordinance and the

doing of such work shall not render Kansas City liable to pay for such work, or any part thereof, otherwise than by the issue of Special Tax Bills, and except as herein provided.

Section 8. The Board of Public Works shall make an approximate estimate of the cost of the work herein provided for, and after the passage of this Ordinance, and after such approximate estimate of the cost of said work shall have been made by said Board, a proceeding separate from the proceeding provided for in Section 4 of this Ordinance, shall be filed in the Circuit Court of Jackson County, Missouri, in the name of the City, against the respective owners of land chargeable under the provisions of Section 28 of Article VIII of the Charter of Kansas City aforesaid, with the cost of said work, for the purpose, and in the manner prescribed in said Section 28 of Article VIII of the Charter of Kansas City, Missouri, and as provided in this Ordinance.

Section 9. The Common Council hereby finds and declares that its action herein has been recommended by the Board of Park Commissioners of Kansas City, Missouri, and by the Board of Public Works, and that the said Boards have recommended to the Common Council that the above mentioned boulevard or highway be graded to the full width thereof as herein provided for and that easements to support embankments or fills be condemned as herein provided for and that payment for all said work be made in Special Tax Bills as herein provided for; and the action of said Board of Park Commissioners and the Board of Public Works in determining that said work shall be done and that the payment for same be made in special tax bills is hereby ratified and confirmed.

Section 10. All Ordinances, or parts of Ordinances in conflict with this Ordinance, are, insofar as they conflict with this ordinance, hereby repealed.

[fol. 64a] Mr. Gantt also identified Resolution of the Board of Park Commissioners of Kansas City, Missouri No. 1762, and the original of said Resolution was offered in evidence as Plaintiffs' Exhibit 2.

Said Plaintiffs' Exhibit 2 is substantially as follows:

#### PLAINTIFFS' EXHIBIT NO. 2 TO GANTTS' TESTIMONY

[fol. 65] Resolution No. 1762

A Resolution to Grade Meyer Boulevard from the West Line of Swope Parkway to the East Line of the Pasco and Recommending the Condemnation of Easements to Support Embankments or Fills, Describing the Nature of the Improvement, and Providing How the Cost Thereof Shall Be Paid

Be it resolved by the Board of Park Commissioners of Kansas City, Missouri:

Section 1. That Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, be graded to the full width thereof and to the established grade of the same. Said work and improvement to conform in all respects to plans and specifications for said work adopted, perfected and approved on the 11th day of December 1914, by the Board of Public Works under its entry Number 73991, and by the Board of Park Commissioners on the 11th day of December 1914, under Resolution No. 1761, which said plans and specifications show the location and description of the proposed public improvement as a whole, and are now on file in the office of said Board of Park Commissioners.

Section 2. That as the proposed grading of said Meyer Boulevard, or part thereof, to the established grade for the full width thereof will cause certain embankments or fills to be made, leaving abutting property below the proposed grade of said boulevard or highway, the Common Council is hereby recommended to condemn in said abutting property, easements or right to support said embankments or fills so far as may be necessary to bring the same boulevard or highway to the required grade and by allowing the material of which said embankments are made to fall upon the abutting property at the natural slope so that the surface of the boulevard or highway may be graded to the full width thereof. The areas of land in which said easements are condemned, are shown in the plat forming part of the plans heretofore referred to in Section 1 hereof, prepared and on file in the office of this Board, showing a profile of the portion [fol. 66] of said Boulevard or highway proposed to be graded and indicating thereon approximately the amount of encroachment of the embankments upon the abutting property. Just compensation for the easements herein recommended to be condemned to be assessed, collected and paid according to law.

Section 3. Payment of the cost of all of said work shall be made in special tax bills evidencing special assessments made and levied against each lot or parcel of land chargeable therewith, respectively, according to law, and inasmuch as in the grading of said boulevard or highway a very large or unusual amount of filling in, or cutting, or grading away of earth or rock is necessary, necessitating an expense of such magnitude as to impose too heavy a burden on the lands situate in the benefit district as limited in Section 3 of Article VIII of the Charter of Kansas City, Missouri, the Board of Park Commissioners recommends to the Common Council that a special benefit district, within which benefit district private property may be assessed for the payment of said work and improvement, be prescribed, determined and established, all as provided by Section 28 of Article VIII of the Charter of Kansas City; and that said tax bills shall be payable in ten (10) annual installments according to law, the first of said installments to become due and collectible as provided in Section 25 of Article VIII of the Charter of Kansas City, in the case of tax bills payable in installments, and that the remaining installments shall be due and collectible, one each year thereafter, on the

30th day of June of each year until all said installments are paid, all as provided in the Charter of Kansas City.

Section 4. The Board of Park Commissioners of Kansas City, Missouri, does hereby recommend to the Common Council of said city to provide for ordinance for the doing of said work, and for the condemning of easements to support embankments or fills and that payment of the whole thereof be made in special tax bills and that the Common Council by ordinance order said work to be done.

[fol. 67] Section 5. That a verified copy of this resolution be delivered to each house of the Common Council as notice to said Common Council of the action and recommendation of this Board.

In testimony whereof, I T. C. Harrington, Secretary of the Board of Park Commissioners of Kansas City, Missouri, have hereunto set my hand and affixed the seal of said Board this 11th day of December 1914.

T. C. Harrington, Secretary of the Board of Park Commissioners of Kansas City, Missouri. (Seal.)

I, E. J. McDonnell, Secretary of the Board of Public Works of Kansas City, Missouri, do hereby certify that said Board of Public Works at a regular meeting thereof held on the 11th day of December 1914, by resolution recorded under its Entry No. 73992 did adopt the foregoing resolution of said Board of Public Works; and that the President and Secretary of said Board of Public Works were duly authorized and instructed to attach the approval of said Board of Public Works to a copy of said resolution.

E. J. McDonnell, Secretary of the Board of Public Works of Kansas City, Missouri. R. L. Gregory, President of the Board of Public Works of Kansas City, Missouri. (Seal.) 73992.

STATE OF MISSOURI,  
County of Jackson,  
Kansas City, ss:

I, J. A. Bermingham, City Clerk of Kansas City, Missouri, hereby certify that the annexed and foregoing is a true and correct copy of a Resolution No. 1762, adopted by the Board of Park Commissioners on the 11th day of December 1914, and by the Board of Public Works on the 11th day of December 1914, as the same appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of Kansas City aforesaid, this 17th day of February A. D. 1920.

J. A. Bermingham, City Clerk. (Seal.)

[fol. 68] Mr. Gantt also identified Ordinance of Kansas City, Missouri, No. 9525, and the original of said ordinance was admitted in evidence by the court over the objections of the Defendants made

at the time as to the relevancy of said ordinance, as Plaintiffs' Exhibit 3.

The material portions of said Ordinance are as follows:

PLAINTIFFS' EXHIBIT NO. 3 TO GANTTS' TESTIMONY

[fol. 69]

Ordinance No. 9525

An Ordinance to Open and Establish a Public Parkway Along Flora, Lydia and Woodland Avenues, 64th Street, and Other Lands in the Westport, Southwest, and Swope Park Districts in Kansas City, Missouri

Whereas, The Board of Park Commissioners of Kansas City, Missouri, has selected and designated certain lands hereinafter described, to be acquired and used for parkway purposes and has recommended to the Common Council of Kansas City, Missouri, the acquisition and establishment of the same as and for a public parkway, accordingly to law, therefore,

Be it ordained by the Common Council of Kansas City:

Section 1. That a public parkway, be, and the same is hereby opened and established along Flora, Lydia and Woodland Avenues, 64th Street and other lands in the Westport, Southwest and Swope Park Districts of Kansas City, Jackson County, Missouri, comprising and including the following described lands situated in Kansas City aforesaid, to wit:

(Here follows description of land taken.)

Section 2. The private property to be taken as aforesaid, shall be paid for by special assessments upon real estate and just compensation therefor shall be assessed, collected and paid as provided in Article XIII of the Charter of Kansas City, Missouri, as existing and now in force.

The Special assessments to be made in payment for the private property taken or damaged in pursuance hereof, shall be paid in twenty (20) equal annual installments, such installments to be payable at such time, in such manner and with such interest as is provided in Section Twenty-one (21) of Article XIII of the Charter of Kansas City, Missouri, for the payment of installments of assessments made payable in more than one installment.

[fol. 70] Section 3. The Common Council determines and prescribes the limits within which private property shall be deemed benefited by the improvement herein proposed and be assessed and charged to pay compensation therefor as follows, to-wit:

(Here follows description of benefit district as shown on plaintiffs' Exhibit #13.)

Section 4. The Common Council finds and declares that the action of the Common Council herein has been recommended by the Board of Park Commissioners of Kansas City, Missouri, as pro-

vided by law, and that said Board of Park Commissioners has selected and designated the land described in Section One of This Ordinance to be acquired and used for parkway purposes and has recommended to said Common Council the acquisition and establishment of the same as and for a public parkway, and has further recommended that if the Common Council should determine that said lands to be acquired as aforesaid, should be paid for by special assessments upon real estate, said assessments shall be made payable in twenty (20) equal annual installments, as provided in Section Two of this ordinance.

Section 5. That ordinance No. 4472 approved March 30th, 1910, and all ordinances or parts of ordinances in conflict herewith, are, inasmuch as they conflict with this ordinance hereby repealed.

Passed Jul. 31, 1911. Frank D. Askew, Speaker Lower House of the Common Council.

Passed Aug. 7, 1911. R. L. Gregory, President, Upper House of the Common Council.

Approved Aug. 9, 1911. Darius A. Brown, Mayor.

Attest: Wm. Clough, City Clerk. (Seal.)

[fol. 71] Mr. Gantt also identified Resolution of the Board of Park Commissioners of Kansas City, Missouri, No. 10363, the original of which resolution was admitted in evidence by the court over the objections of the Defendants made at the time as to the relevancy of said resolution as Plaintiffs' Exhibit 4.

The material portions of said exhibit are as follows:

[fol. 72] PLAINTIFFS' EXHIBIT NUMBER 41 TO GANTT'S TESTIMONY

### Resolution No. 10363

A Resolution Selecting and Designating Certain Land in the Westport, Southwest, and Swope Park Districts in Kansas City, Missouri, for Parkway Purposes

Be it resolved by the Board of Park Commissioners of Kansas City, Missouri:

Section 1. That the following described land situated within the Westport, Southwest and Swope Park Districts of Kansas City, Jackson County, Missouri, be and the same is hereby selected and designated as and for a public parkway, under and in pursuance of Article Thirteen (XIII) of the charter of Kansas City, Missouri, said land being described by metes and bounds as follows, to wit:

(Here follows same description of land as set out in Ordinance Number 9525.)

The Board of Park Commissioners does hereby recommend to the Common Council of Kansas City, Missouri, the establishment of a public parkway to include all the land within the above described

metes and bounds, excepting the use and easement for a double track street railway of the track, or tracts, now occupied and used by the Metropolitan Street Railway Company, The Interurban South Side Railway, a corporation, and the old Kansas City Memphis and Mobile Railroad Company, now known as the Kansas City and Westport Belt Railway Company, their successors and assigns, within the boundary lines above described.

That all private property within said metes and bounds, as above stated and specified and herein before described, saving only the exceptions hereinbefore specified and excluded, be acquired for parkway purposes by purchase, condemnation or otherwise as said Common Council may deem best.

[fol. 73] Section 2. In case that the Common Council determines that said land — be acquired as aforesaid, shall be paid for by special assessments upon real estate, the Board of Park Commissioners hereby recommends that said assessments shall be made payable in twenty (20) equal annual installments, to be payable at such times, in such manner and with such interest as provided in Section Twenty-one (21) of Article Thirteen (XIII) of the Charter of Kansas City, Missouri, for the payment of installments of assessments made payable in more than one (1) installment.

Section 3. That resolution No. 9154 adopted March Twenty-eighth (28th) 1910, and all resolutions, or parts of resolutions, in conflict with this resolution, insofar as they conflict, are hereby rescinded.

Section 4. That a certified copy of this resolution be delivered to each house of the Common Council of Kansas City, Missouri, as notice to said Common Council of the action and recommendations of this Board.

Office of the Board of Park Commissioners

Kansas City, Missouri

I, Frank P. Gossard, Secretary of the Board of Park Commissioners, of Kansas City, Missouri, do hereby certify that the above and foregoing is a true and perfect copy of a certain resolution of said Board, known and designated as "Resolution No. 10363," as the same appears of record in the office of said Board and that said resolution was adopted by said Board of Park Commissioners at a regular meeting thereof held on the 10th day of July, 1911.

In testimony whereof, I, Frank P. Gossard, Secretary of the Board of Park Commissioners of Kansas City, Missouri, have hereunto set my hand and affixed the seal of said Board this 15th day of July, A. D. 1911.

Frank P. Gossard, Secretary of the Board of Park Commissioners of Kansas City, Missouri.

[fol. 74] Mr. Gantt also identified Ordinance of Kansas City, Missouri, No. 16850, the original of which ordinance was admitted



by the court in evidence over the objections of the defendants made at the time as to the relevancy of said ordinance, as Plaintiffs' Exhibit 5.

Said Exhibit 5 is substantially as follows:

[fol. 75] PLAINTIFFS' EXHIBIT NUMBER 5 TO GANTT'S TESTIMONY

Ordinance No. 16850

An Ordinance to Name the Parkway in the Westport, Southwest, and Swope Park Districts, Heretofore Opened and Established by Ordinance No. 9525, Approved August 9, 1911

Whereas, the Board of Park Commissioners of Kansas City, Missouri, has by resolution named a parkway in the Westport, Southwest and Swope Park Districts in Kansas City, Missouri, opened and established under Ordinance No. 9525, approved August 9, 1911, and has recommended to the Common Council to concur therein by Ordinance, and

Whereas, it is necessary for the convenience of improving the parkway, and house numbering, on said parkway to establish a name or names for said parkway, therefore,

Be it ordained by the Common Council of Kansas City:

Section 1. \* \* \*

That all that portion of the Parkway (along 64th Street), opened and established under said Ordinance No. 9525, from the east line of Wornall Road to a line one hundred and twenty (120) feet West of and parallel with the east line of the Northwest quarter ( $\frac{1}{4}$ ) of the Southwest quarter ( $\frac{1}{4}$ ) of said Section No. Four (4) and South of the South line of Sixty-third (63rd) Street, (except that portion of said parkway (along the South prolongation of Rockhill Road) as described under said Ordinance No. 9525, lying north of a line seventy (70) feet north of and parallel with the south line of the North half ( $\frac{1}{2}$ ) of the Northeast quarter ( $\frac{1}{4}$ ) of the Southeast quarter ( $\frac{1}{4}$ ) of Section No. Five (5), Township No. Forty-eight (48) North, Range No. Thirty-three (33) West, and all that portion [fol. 76] of said parkway (on certain lands near Sixty-fifth (65th) Street, as described under said Ordinance No. 9525, from a line two hundred forty-seven and three tenths (247.3) feet West of and parallel with the East line of the Southwest quarter ( $\frac{1}{4}$ ) of the Southeast quarter ( $\frac{1}{4}$ ) of the Southeast quarter ( $\frac{1}{4}$ ) of said Section No. Four (4), to the East line of the southwest quarter ( $\frac{1}{4}$ ) of the Southeast quarter ( $\frac{1}{4}$ ) of section No. Three (3), Township No. Forty-eight (48) North, Range No. Thirty-three (33) West, be and the same is hereby named and shall hereafter be known and designated as Meyer Boulevard; and

\* \* \* \* \*

Section 2. The Common Council finds and declares that the action of the Common Council has been recommended by the Board of Park Commissioners of said City as provided by law.



Section 3. All Ordinances or parts of Ordinances in conflict with this Ordinance, are, inasmuch as they conflict with this Ordinance, hereby repealed.

Passed Jul. 21, 1913. F. J. Shinnick, Speaker Lower House of the Common Council.

Passed July 28, 1913. Peter Michaels, Act. President Upper House of the Common Council.

Approved Aug. 1, 1913. Henry L. Jost, Mayor.

Attest, J. A. Bermingham, City Clerk. (Seal.)

[fol. 77] Plaintiffs also offered in evidence Resolution of the Board of Park Commissioners No. 381, identified by Mr. Gantt, the admission of which in evidence was objected to on behalf of the Defendants as irrelevant to any issue in the case. Said Resolution was admitted in evidence by the court as Plaintiffs' Exhibit 6, which, omitting the formal and immaterial portions, is as follows:

[fol. 78] PLAINTIFFS' EXHIBIT NUMBER 6 TO GANTT'S TESTIMONY

#### Resolution No. 381

A Resolution to Name the Parkway in the Westport, Southwest, and Swope Park Districts, in Kansas City, Missouri, Opened and Established under Ordinance No. 9525, Approved August 9, 1911

Whereas, the parkway, opened and established under Ordinance No. 9525, approved August 9, 1911, and entitled "An Ordinance to open and establish a public parkway along Flora, Lydia and Woodland Avenues, 64th Street and other lands in the Westport, Southwest and Swope Park Districts in Kansas City, Missouri," has not been named, and

Whereas, it is necessary for the convenience of improving the parkway, and house numbering, to establish a name or names for said parkway, therefore,

Be it resolved by the Board of Park Commissioners of Kansas City, Missouri:

#### Section 1. \* \* \*

That all that portion of the parkway (along 64th Street), opened and established under said Ordinance No. 9525, from the east line of Wornall Road to a line one hundred and twenty (120) feet west of and parallel with the east line of the northwest quarter ( $\frac{1}{4}$ ) of the southwest quarter ( $\frac{1}{4}$ ) of said Section No. Four (4) and south of the south line of Sixty-third (63) Street, (except that portion of said parkway (along the south prolongation of Rockhill Road) as described under said Ordinance No. 9525, lying north of a line seventy (70) feet north of and parallel with the south line of the north half ( $\frac{1}{2}$ ) of the northeast quarter ( $\frac{1}{4}$ ) of the southeast quarter ( $\frac{1}{4}$ ) of Section No. Five (5), Township No. Forty-eight (48) north, Range, No. Thirty-three (33) west, and all that portion of said parkway (on certain lands near Sixty Fifth (65) and Sixty-

sixth Streets, as described under said Ordinance No. 9525 from a line [fol. 79] two hundred forty-seven and three tenths (247.3) feet west of and parallel with the east line of the southwest quarter ( $\frac{1}{4}$ ) of the southeast quarter ( $\frac{1}{4}$ ) of said Section No. Four (4), to the east line of the southwest quarter ( $\frac{1}{4}$ ) of the southeast quarter ( $\frac{1}{4}$ ) of Section No. three (3), Township No. Forty-eight (48) north, Range No. Thirty-three (33) west, be and the same is hereby named and shall hereafter be known and designated as Meyer Boulevard; and

\* \* \* \* \*

Section 2. A Plat showing the lines of the parkway herein named and the boundaries thereof marked "Exhibit A," is hereby approved by this Board and made a part of this resolution, and a copy of the same shall accompany a certified copy of this resolution to be delivered to each House of the Common Council of Kansas City, Missouri as notice to said Common Council of the action and recommendation of this Board.

#### Office of the Board of Park Commissioners

#### Kansas City, Missouri

I, T. C. Harrington, Secretary of the Board of Park Commissioners, of Kansas City, Missouri, do hereby certify that the above and foregoing is a true and perfect copy of a certain resolution of said Board, known and designated as "Resolution No. 381," as the same appears of record in the office of said Board, and that said resolution was adopted by said Board of Park Commissioners at a regular meeting thereof *thereof* held on the 23 day of June, A. D. 1913.

In testimony whereof, I, T. C. Harrington, Secretary of the Board of Park Commissioners, of Kansas City, Missouri, have hereunto set my hand and affixed the seal of said Board, this 1st day of July, A. D. 1913.

(Signed) T. C. Harrington, Secretary of the Board of Park Commissioners of Kansas City, Missouri. (Seal.)

[fol. 80] On cross examination Mr. Gantt identified Ordinance of Kansas City, Missouri No. 24693, the original of which Ordinance was admitted in evidence as Defendants' Exhibit A, which exhibit is substantially as follows:

## [fol. 81] DEFENDANTS' EXHIBIT A TO GANTT'S TESTIMONY

Form Approved. Jay M. Lee, A. C. C.

An Ordinance Providing for and Authorizing the Work of Grading Meyer Boulevard from the West Line of Swope Parkway to the East Line of the Paseo, Stating the Nature of the Improvement, How the Cost Thereof Shall be Paid, and How the Assessments Therefor shall be Made and Levied, and Ratifying, Approving and Confirming a contract Therefor with the McMillan Contracting Company

Be it ordained by the Common Council of Kansas City:

Section 1. That Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, be graded to the full width thereof, and to the established grade of the same.

Section 2. That the said work and improvement shall be of the nature described and specified in and shall be done in accordance with the plans and specifications adopted, perfected and approved by the Board of Park Commissioners on the 11th day of December 1914, by Resolution No. 1761, and with the terms of the contract and specifications therefore between the McMillan Contracting Company as principal E. E. Tutt and Fidelity & Deposit Company of Maryland as sureties and the Board of Park Commissioners in behalf of Kansas City, Missouri, dated the 26th day of October 1915, which said plans and specifications are now on file in the office of said Board; that said contract is hereby ratified, approved and confirmed, and that said plans, specifications and contract are hereby made a part of this Ordinance as fully and with the same effect as though set out verbatim. And the said work and improvement shall be made and executed and the contract price paid as herein provided. Said improvement is hereby provided for and authorized.

Section 3. Payment of the cost of all of said work, after deducting the portion of the whole cost, if any, which the City may pay, shall be made in special tax bills, evidencing special assessments made and levied against each lot or parcel of land chargeable therewith by ap-[fol. 82] portioning such cost among and against the various lots, tracts and parcels of land benefited thereby within the benefit district provided and described in Ordinance No. 21831, approved January 26, 1915, according to the assessed value thereof, exclusive of improvements, all as provided in Section No. 28 of Article VIII of the Charter of Kansas City, Missouri, and as provided in said Ordinance No. 21831; and the said benefit district within which parcels of land are benefited as aforesaid, and within which it is proposed to assess property for the payment of said work and improvement as aforesaid, and as set forth in said Ordinance No. 21831, is hereby provided and determined to be as follows, to-wit:

(Here follows description of benefit district, as shown in Plaintiff's Exhibit No. 12.)

The improvement provided for herein the Common Council deems necessary to have done, but the passage of this Ordinance and the doing of said work shall not render Kansas City liable to pay for such work, or any part thereof, otherwise than by the issue of special tax bills.

Section 4. The special tax bills to be issued for the work and improvement herein provided for shall be made payable in ten (10) equal installments according to law; the first installment to become due and collectible as provided in Section No. 25 of Article VII of the Charter of Kansas City, Missouri, in case of tax bills payable in installments, and the remaining installments to become due and collectible one each year thereafter according to law until all of said installments are paid.

Section 5. All ordinances or parts of ordinances in conflict with this ordinance are, insofar as they conflict with this ordinance, hereby repealed.

This ordinance is hereby recommended this 2nd day of November, 1915.

Board of Park Commissioners of Kansas City, Missouri, By  
[fol. 83] Cusil Lechtman, President. Attest: T. C. Harrington,  
Secretary. (Seal.)

Passed Nov. 15, 1915. Miles Bulger, Speaker Lower House of the Common Council.

Passed Nov. 29, 1915. J. Leo Ryan, President Upper House of the Common Council.

Approved Dec. 9, 1915. Henry L. Jost, Mayor. Attest: J. A. Birmingham, City Clerk. (Seal.)

[fol. 84] There was introduced as Defendants' Exhibit B, after identification by the witness, Resolution of the Board of Public Works of Kansas City, Missouri No. 85155, which is in words and figures as follows:

[fol. 85] DEFENDANTS' EXHIBIT B TO GANTT'S TESTIMONY

#### Entry No. 85155

Whereas, under date of October 26, 1915, the Board of Park Commissioners of Kansas City, Missouri, in behalf of said city, executed a contract with the McMillan Construction Company, a corporation, as principal, and the Fidelity Deposit Company of Maryland, and E. E. Tutt, as sureties, for the doing of certain work therein referred to, and

Whereas, by ordinance of Kansas City, Missouri, numbered 24693, approved December 9, 1915, said contract was duly ratified, approved and confirmed, Now Therefore,

Be it resolved by the Board of Public Works of Kansas City, Missouri:

Section 1. That said ordinance and said contract and the doing of the work thereunder in accordance therewith, be and the same are hereby in all respects approved and recommended by this Board.

Section 2. That the president and secretary of this Board are hereby authorized and directed to endorse the approval of this Board on said ordinance.

We, the undersigned, respectively president and secretary of the Board of Public Works of Kansas City, Missouri, hereby certify that the above and foregoing resolution was duly adopted and entered of record under Entry No. 85155, in the office of said Board this 10 day of December, 1915.

Witness our hands:

A. E. Gallagher, President. Attest: Thos. F. Callahan, Secretary. (Seal.)

[fol. 86] SEAMAN RUSSELL, being duly sworn and examined on behalf of Plaintiffs, testified:

That he is Information Clerk for the Board of Public Works of Kansas City, Missouri, and as such identified Volume 92 of the Grading Record on file in the office of the Board of Public Works, which Volume at Pages 209 to 212 inclusive shows the apportionment of the tax bills for the grading on Meyer Boulevard, the assessed value of the various tracts in the benefit district and the appraisal made by the City Assessor.

Said Pages 209 to 212 inclusive of Volume 92 of the Grading Record in the office of the Board of Public Works were introduced in evidence by the Complainants and are substantially as follows:

[fol. 87]

#### EXHIBIT IN EVIDENCE

##### Assessment Roll

Assessment of Lands, Apportionment of Special Tax, and Register of Special Tax Bills for Grading Meyer Boulevard from the West Line of Swope Parkway to the East Line of the Paseo.

##### McMillan Contracting Company, Contractor

These tax bills are payable in Ten annual installments.

(a) Ordinance No. 24693. Approved December 9th, 1915. No. of Cu. yds. earth 305,062.24. No. of Cu. yds. rock 24,101.94. Cost per cu. yd. earth 25½ cts. Cost per cu. yd. rock 80 cts. Total Cost \$97,688.90.

(b) Sent to City Assessor Nov. 16, 1916. Recd. from City Assessor Nov. 21, 1916. Total Assessment \$378,955.00. Rate .25778497.

No. of bill	Tract number	Value of land	Owner's name	Apportionment of tax	
				Total	Installment
1	1	435	Methodist Church.....	112.10	.....
2	2	25,965	Gertrude M. Brown.....	6,693.40	669.34
3	3	25,440	Felix H. Swope.....	6,558.00	655.80
4	4	3,920	Thos. H. Swope Estate.....	1,010.50	101.05
5	5	5,760	Thos. H. Swope Estate.....	1,484.80	148.48
6	6	29,000	Thos. H. Swope Estate.....	7,475.80	747.58
7	7	26,320	Stella Swope et al.....	6,784.90	678.49
8	8	29,250	Felix Swope.....	7,540.20	754.02
9	9	9,435	Thos. Swope Estate.....	2,432.20	243.22
10	10	30,360	Thos. Swope Estate.....	7,826.40	782.64
11	11	48,535	Evanston Park Rty. Co....	12,511.60	1,251.16
12	12	11,930	Thos. H. Swope Estate.....	3,075.40	307.54
13	13	24,000	Thos. H. Swope Estate....	6,186.90	618.69
14	14	24,920	Carrie S. Abernathy.....	6,424.00	642.40
[fol. 88]					
15	15	24,570	Carrie S. Abernathy.....	6,333.80	633.38
16	16	6,020	Granite Land Co.....	1,551.90	155.19
17	17	6,525	Fred B. Heath et al.....	1,682.00	168.20
18	18	9,750	Richard W. Hocker.....	2,513.40	251.34
19	19	18,480	Dudley Harper et al.....	4,763.90	476.39
20	20	6,460	Geo. W. Menke.....	1,665.30	166.53
21	21	3,320	Mary R. Jacobs.....	855.80	85.58
22	22	3,015	Laure M. Parker.....	777.20	77.72
23	23	4,425	Dudley Harper et al.....	1,140.70	114.07
24	24	1,120	Dudley Harper et al.....	288.70	28.87

## Board of Public Works

95682.

Kansas City, Mo., Nov. 14, 1916.

To the City Assessor:

You are hereby required to make and return to this Board an assessment of the value of all lands exclusive of improvements, within the limits prescribed and determined by Ordinance No. 24693, approved December 9th, 1915, under the provisions of Section 28, Article 8, of the Charter of Kansas City, for the purpose of charging the same with the cost of grading Meyer Boulevard, from the west line of Swope Parkway to the east line of The Paseo, as provided by said Ordinance No. 24693, directing the grading of said Boulevard, as required by said Ordinance and by Sections 3 and 28, of Article 8, of the Charter of Kansas City aforesaid.

The Board of Public Works of Kansas City, Missouri, By L. Oppenstein, President. Attest: J. Pearce Kane, Secretary.  
(Seal.)

I, Robert S. Stone, City Assessor of Kansas City, aforesaid, certify [fol. 89] that the lands mentioned in the foregoing statement or roll, have been by me fairly and legally assessed, and that my report thereof in the column headed "Value of land fixed by the City Assessor," is correct, I having made such assessment as directed by the Board of Public Works.

Witness my hand this 18th day of November, 1916.

No. 95903.

Robert S. Stone, City Assessor.

## Board of Public Works

No. 95903.

Kansas City, Missouri, November 21, 1916.

The Board of Public Works hereby certifies that it has apportioned the cost of the work of grading Meyer Boulevard, from the west line of Swope Parkway to the east line of The Paseo, as provided by Ordinance No. 24693, approved December 9th, 1915, among the several lots and parcels of land to be charged therewith and charged each lot or parcel of land with its proper share of said cost; and that the foregoing is the correct apportionment of such cost, according to the values of said lots and parcels of land.

The Board of Public Works of Kansas City, Missouri, By L. Oppenstein, President. Attest: J. Pearce Kane, Secretary.

Kansas City, Missouri, November 23rd, 1916.

Received this day the above mentioned Special Tax Bills amounting to the sum of Ninety Seven Thousand Six Hundred and Eighty and 90/100 Dollars, the same being in full of all claims against the City of Kansas City on account of the above mentioned work.

McMillan Contracting Company, Contractor, By Fidelity Trust Company, Assignee, By Lester W. Hall, Vice President.

[fol. 90] MAURICE CAREY, being duly sworn and examined on behalf of the Complainants testified that he is Chief Clerk in the office of the City Treasurer of Kansas City, Missouri, and as such identified the Land Tax Books on file in the City Treasurer's office for the years 1915, 1916 and 1917, which books show the assessed value of property in Kansas City, Missouri for said years as fixed by the County Assessor for purposes of general taxation.

Said books were offered in evidence by the Complainants as to the particular tracts in controversy in this suit, to the admission of which evidence the Defendants objected on the ground that said evidence was incompetent, irrelevant and immaterial and as having no bearing upon any issue in the case. Said books were admitted in evidence by the court over the defendants' objection as to the particular tracts in controversy.

The assessed valuations of each tract in controversy as shown by said Land Tax Books for the year 1915, 1916 and 1917 so admitted in evidence by the court are as follows:

[fol. 91]

## EXHIBIT IN EVIDENCE

Assessment for Purposes of General Taxation of Tracts in Benefit District for 1915, 1916, and 1917

Tract number	Owner	1915	1916	1917
2	Gertrude M. Brown.....	\$4,750	\$4,750	\$5,000
3	Felix H. Swope.....	4,470	4,470	4,320
8	Felix H. Swope.....	6,240	6,240	6,240
11	Evanston Park Realty Co.....	12,480	12,480	12,480
14	Carrie Singer Abernathy.....	6,400	6,400	6,400
15	Carrie Singer Abernathy.....	6,000	6,000	6,000



[fol. 92] Mr. Bowersock: If the testimony in regard to the assessed values of these lots is admitted we desire to offer from these same books the assessed values of all property in the benefit district.

The Court: Very well, I think that ought to be done.

Said Land Tax Books were, thereupon, admitted in evidence as to all the tracts in the benefit district; the assessed valuations of said tracts as shown by said books for the years 1915, 1916 and 1917 so admitted in evidence are as follows:

[fol. 93]

EXHIBIT IN EVIDENCE

Assessment for Purposes of General Taxation of Tracts in Benefit District for 1915, 1916, and 1917

Tract number	Owner	1915	1916	1917
2	Gertrude M. Brown.....	\$4,750	\$4,750	\$5,000
3	Felix H. Swope.....	4,470	4,470	4,320
8	Felix H. Swope.....	6,240	6,240	6,240
14	Carrie Singer Abernathy.....	6,400	6,400	6,400
15	Carrie Singer Abernathy.....	6,000	6,000	6,000
4	Thos. H. Swope, Jr.....	780	5 & 6	680
5 & 6	Thos. H. Swope, Jr.....	9,390	10,170	9,390
7	Margaret Swope Miller, Sarah Swope and Stella Swope.....	6,240	6,240	6,240
9 & 10	Thos. Swope, Jr.....	10,350	10,350	10,350
11	Evanston-Park Realty Co.....	12,480	12,480	12,480
12 & 13	Thos. Swope, Jr.....	10,360	10,360	10,360
16	Granite Land Co.....	1,500	1,500	1,500
17	Frederick B. Heath, James C. Leiter, Geo. A. Leiter, Gustave W. Bachman.....	1,500	1,500	1,500
18	Richard W. Hocker.....	3,000	3,000	3,000
19	Nannie R. Harper et al.....	4,860	4,860	4,860
20	William V. Wherrett.....	1,600	1,600	1,600
21	Cora A. Garry et al.....	750	750	750
22	Laura M. Parker.....	750	750	750
23 & 24	Nannie R. Harper et al.....	8,600	8,600	8,600

[fol. 94] Thereupon Complainant- offered in evidence tax bill No. 11 purporting to have been issued pursuant to Ordinance of Kansas City, Missouri, No. 24693, said tax bill covering the tract in controversy.

Said tax bill was admitted in evidence as Plaintiffs' Exhibit No. 10.

Said tax bill is in substantially the following form:

[fol. 95] EVIDENCE: PLAINTIFFS' EXHIBIT No. 10

No. 11. Ordinance No. 24693

State of Missouri

Kansas City Special Tax Bill

Issued on the Installment Plan

This is to certify, That the following described land, exclusive of improvements, situate within the corporate limits of Kansas City,



Jackson County, and State of Missouri, to-wit: (Here following description of tract No. 11), has been duly asse-d and charged with the sum of Twelve Thousand Five Hundred Eleven and 60/100 Dollars (\$12,511.60) as a special tax to pay its proportionate share of the cost of the public improvement provided for in Ordinance No. 24093 of Kansas City, Missouri.

Said work has been completed according to contract by McMillan Contracting Company, the Contractor, for said improvement, to whom this Special Tax Bill is issued in part payment therefor, and has been accepted by the Board of Public Works, and the said sum has been duly levied, apportioned and charged against said land, as provided by law, and is a lien thereon from and after this date. Such lien shall continue for a period of one year after the date the last installment matures, as expressed upon its face and no longer unless, within such year, suit shall have been instituted to collect this Tax Bill, and unless within ten days after the institution of such suit notice of the bringing of such suit shall have been filed with the City Treasurer, in which case the lien of this Tax Bill shall continue until the termination of such suit and until the sale of the property under execution of the judgment establishing the same, and no default in the payment of any interest or any installment shall operate to diminish the period during which such lien shall continue, or during which suit may be brought.

[fol. 96] This Tax Bill is payable in ten equal installments.

(Here follow amounts of the various installments together with the dates on which they are payable.)

If any installment of this Tax Bill be not paid when due, then all the unpaid installments shall immediately become due and collectible, together with interest thereon, at the rate of eight per cent. per annum from the date to which interest has already been paid on said installments.

Certified in the name of the President of the Board of Public Works by the undersigned person by said Board thereto authorized by resolution duly adopted and recorded on the records of said Board this 21 day of Nov. 1916.

L. Oppenstein, President, By M. E. Clinard.

[fol. 97] CHARLES D. WOODWARD, being duly sworn and examined on behalf of the Complainants testified as follows:

My name is Charles D. Woodward; I live in Kansas City, Missouri, my profession being that of an engineer. I practice with the firm of Tuttle, Ayres, Woodward Engineering Company, and am a member of that firm. I have been in that business about fourteen years.

I have made some measurements and investigations and tabulations in reference to the grading proceedings on Meyer Boulevard involved in this case. I have taken the plat prepared at the City Engineer's office and reduced it to half scale. This (Plaintiffs' Exhibit 12) is a blue-print reduction or half scale plat of the original

plan for grading Meyer Boulevard from the west line of Swope Parkway to the east line of Paseo. The scale indicated at the bottom of the exhibit marked under the work "profile" correctly indicates the scale of this map and the scale of the original drawing of which it is an exact duplicate. This map (Exhibit 12) shows the street line, the lines of the boulevard as contemplated to be graded at that time, the ownership lines and the lines of the benefit district to be assessed for the improvement. The exhibit also shows in colors the division of the tax assessed against the different tracts according to the areas of certain portions of certain tracts. The north boundary line of the benefit district is the south line of 63rd Street; the south line of the benefit district is the north line of 67th Street; the east line of the benefit district is the center line of Swope Parkway; the west line of the benefit district is the west line of the east half of the east half of the northwest quarter of the southeast quarter of Section 4, Township 48, Range 33, from 65th Street to a point 1,079 feet south of the center of 65th street. It is the northerly [fol. 98] prolongation of the east line of the Paseo south of Meyer Boulevard. On the map some of the streets are outlined and some are not; for instance 67th Street is marked through, Prospect Avenue is marked through, 65th Street is marked partially through. This indicates, I think, the condition at the time of the grading proceeding. At any rate this is the condition shown on the original plat of which this is a copy. I am not certain whether 65th Street had actually been opened from Brooklyn to Prospect as indicated on the map.

The large heavy line shown on the map through the entire benefit district is intended to outline Meyer Boulevard from points where it is to be graded. The distance along the center line of Meyer Boulevard from the east line of Prospect to the west line of Swope Parkway is 5,560 feet, or in other words approximately a mile in length. The width of the Boulevard as improved running east from Brooklyn is 220 feet up to a point approximately 800 feet west of Swope Parkway and widens to a width of 500 feet and continues east at that width through Swope Parkway. At the extreme right hand part of the map appear the words "Swope Park." Those words represent the location of the entrance to Swope Park immediately to the east of the widened part of Meyer Boulevard—in other words the Boulevard leads directly into the Park.

The distance from Meyer Boulevard to the southernmost point of the Abernathy tract is 530 feet—that is the nearest point that the Abernathy tract reaches toward the improvement is approximately 530 feet. The distance from the Boulevard along Prospect Avenue to 63rd Street is approximately 1,820 feet. The distance from Meyer Boulevard to the southernmost part of the Abernathy tract on the west side of the Abernathy tract is approximately 690 feet. The distance from Meyer Boulevard to 63rd Street, that is, to the northernmost part of the Abernathy tract on Brooklyn Avenue is approximately 1,980 feet.

[fol. 99] The southeast corner of tract 11 (the Hagerman tract) is approximately 250 feet of the north line of Meyer Boulevard. The

southwest corner of Tract 11 is approximately 480 feet north of the north line of Meyer Boulevard. The southwest corner of Tract 8 is approximately 250 feet north of the north line of Meyer Boulevard and the southeast corner is 208 feet north of the north line of Meyer Boulevard. The northeast corner of Tract 11 is approximately 1,540 feet north of the north line of Meyer Boulevard. The northwest corner of Tract 11 is approximately 1,770 feet north of the north line of Meyer Boulevard.

The southwest corner of Tract 3 is 208 feet north of the north line of Meyer Boulevard and the southeast corner of Tract 3 is 248 feet north of the north line of Meyer Boulevard. The southeast corner of Tract 2 is 728 feet north of the north line of Meyer Boulevard. The southwest corner of Tract 2 is 868 feet north of the north line of Meyer Boulevard. The northeast corner of Tract 1 is 1,358 feet north of the north line of Meyer Boulevard. The northwest corner of Tract 2 is 1,498 feet north of the north line of Meyer Boulevard.

The distance from the intersection of Meyer Boulevard and Brooklyn Avenue to Ninth Street and Grand Avenue in Kansas City, which is the location of the Post Office and Federal Building is 6.7 miles, on a straight line, and 7.6 miles by the shortest traveled line.

On this blue print the numbers marked in large figures represent the numbers of the various tracts lying within the benefit district according to their tax bill number. The figure "T" followed by figures representing dollars and cents represent the amount of the tax bills assessed against each of these tracts. The "A" refers to that [fol. 100] portion of each tract lying within 150 feet of Meyer Boulevard and the amount following the letter "A" is to the amount of the tax against each tract as the area of that portion of the tract lying within 150 feet of Meyer Boulevard is to the area of the entire tract. The letter "X" refers to that portion of each tract lying within 150 feet of 63rd Street and the amount following the letter "X" is to the amount of the tax against each tract as the area of that portion lying within 150 feet of 63rd Street is to the area of the entire tract. The yellow lines on each side of the Boulevard indicate lines parallel with the Boulevard lines 150 feet distant from the Boulevard. The line just south of 63rd Street is a line 150 feet south of and parallel to the south line of 63rd Street.

Mr. Langworthy:

Q. Now, I wish you would take the total amount of the tax which according to your estimate was assessed against the 150 feet immediately south of 63rd Street along the entire northern area of the benefit district and compare the total amount of that tax to the total amount of the tax assessed against the land immediately south of Meyer Boulevard for a distance of 150 feet?

At this point defendants objected to the admission of such testimony on the ground that it had no bearing on the issues involved in the case. This objection was by the Court overruled and the witness permitted to answer.

A. The total amount of the tax assessed against the 150 feet strip lying immediately south of and adjoining the south line of 63rd Street is approximately \$6,594.00. The total amount of the tax assessed against the 150 feet lying immediately south of and adjoining Meyer Boulevard is approximately \$6,060.00. The tract of 150 feet just south of 63rd Street and the tract of 150 feet just south of Meyer Boulevard are approximately the same in area. The tract 150 feet south of Meyer Boulevard has slightly the greater area. The [fol. 101] approximate total area of the land lying on both sides of Meyer Boulevard from Brooklyn to Swope Park and extending back 150 feet from the Boulevard line is  $37\frac{1}{2}$  acres.

The total area of Tracts 14 and 15 inclusive of streets is 36.4 acres. Therefore, the total area of all the land lying on both sides of the Boulevard extending back 150 feet is slightly more than the total area of Tracts 14 and 15.

The total tax assessed against all of the property along both sides of the Boulevard extending back for a distance of 150 feet is \$12,696.00.

The total tax assessed against Tracts 14 and 15 is \$12,758.00, so that Tracts 14 and 15 have a less area than the land adjacent to the Boulevard on both sides, extending back 150 feet, but the tax assessed against Tracts 14 and 15 is greater than the tax assessed against said area.

Complainants thereupon offered in evidence the computation or compilation made by witness. This compilation was admitted in evidence by the Court over the defendants' objections as Exhibit 14.

It is in words and figures as follows:

[fol. 102] PLAINTIFFS' EXHIBIT No. 14 TO WOODWARD'S TESTIMONY

Frank Tuttle, Albert T. Ayers, Charles D. Woodward

Telephone, Home—Main 87; Bell—Main 5004

Tuttle-Ayers-Woodward Engineering Co.

Civil Engineers

305-306-307 Reliance Building

214 East 10th Street

Kansas City

Feb. 13, 1920.

Mr. Roy Thompson,  
Scarritt Building,  
City:

We have prepared the following table which together with blue prints herewith enclosed sets forth the results of our investigation of the Meyer Boulevard Grading from The Paseo to Swope Parkway:

Tax bill No.	Amount of tax bill on		Area of tracts fronting on blvd., acres	Area of portion of the tracts within 1,500 ft. of blvd., acres	Rate of tax per acre on tracts front- ing on blvd.	Amount of tax on 150 ft. strip if proportional to acreage basis
	Tracts north of Meyer Boulevard	Tracts south of Meyer Boulevard				
1.....	\$112.10	.....	.....	.....	.....	.....
2.....	6,693.40	.....	.....	.....	.....	.....
3.....	6,558.00	.....	.....	.....	.....	.....
4.....	1,010.50	.....	2.56	1.33	\$394.73	\$524.99
5.....	1,484.80	.....	3.92	3.31	378.78	1,253.75
6.....	.....	\$7,475.80	22.72	4.67	329.04	1,536.62
7.....	6,784.90	.....	.....	.....	.....	.....
8.....	7,540.20	.....	.....	.....	.....	.....
9.....	2,432.20	.....	6.43	4.53	378.26	1,713.51
10.....	.....	7,826.40	25.79	4.53	303.47	1,374.70
11.....	12,511.60	.....	.....	.....	.....	.....
12.....	3,075.40	.....	10.29	4.44	298.87	1,327.00
13.....	.....	6,186.90	20.80	4.44	297.45	1,320.67
14.....	6,424.00	.....	.....	.....	.....	.....
15.....	6,333.80	.....	.....	.....	.....	.....
16.....	1,551.90	.....	.....	.....	.....	.....
17.....	1,682.00	.....	4.47	2.15	376.29	809.02
18.....	2,513.40	.....	7.63	2.21	329.41	728.00
19.....	.....	4,763.90	13.28	4.36	358.73	1,564.05
20.....	1,665.30	.....	.....	.....	.....	.....
21.....	855.80	.....	.....	.....	.....	.....
22.....	777.20	.....	.....	.....	.....	.....
23.....	1,140.70	.....	3.10	0.76	367.97	279.66
24.....	.....	288.70	0.83	0.76	347.83	264.35
Totals.....	\$71,147.20	26,541.70	121.82	37.49	.....	\$12,696.32

[fol. 103] Mr. Langworthy: I don't know whether I have formally offered this plat in evidence. I want to offer it together with all notations shown thereon.

Mr. Winger: That is the copy referred to in Ordinance #21831?

Mr. Langworthy: Yes.

Said plat was thereupon admitted in evidence by the Court as Plaintiff's Exhibit 12, and the same is made a part of this record and is filed herewith.

Mr. Langworthy: I also desire to offer in evidence Exhibit 13, which is a map of Kansas City, Missouri, for the year 1915. This is issued by the Board of Park Commissioners of Kansas City, Missouri, George E. Kessler, Landscape Architect. And I desire to call the Court's particular attention to the boulevards, which are marked in green showing the manner in which the boulevards throughout the city all flow into this Meyer Boulevard, which is the boulevard involved in this proceeding.

The Court thereupon admitted in evidence as Plaintiffs' Exhibit 13, said map of Kansas City, Missouri, issued by the Board of Park Commissioners. Said Exhibit is made a part of this record and is filed herewith.

Mr. Langworthy: Now, if the Court please, we haven't done it yet, but it is merely a matter of mathematical drawing. We introduced in evidence this morning Ordinances showing the benefit district which was used at the time the property was condemned for Meyer Boulevard, and, for convenience of the Court, we will ask Mr. Woodward to indicate on this map here the exact boundaries of these ordinances. It is a mere matter of putting it on the map and we will have that done. I think that is all I want to ask Mr. Woodward.

Mr. Woodward further testified that he is familiar with the division of the city into various park districts, and that Meyer Boulevard [fol. 104] is located in the Brooklyn and Swope Park Districts, two-thirds of it being in Swope Park District and approximately one-third in the Southwest Park District.

On cross-examination Mr. Woodward testified as follows:

All the information shown on Exhibit 12 was on the original plat except that shown in yellow. I have added the information shown in yellow. The blue-print itself is an exact duplication.

The figures and letters just inside the exterior lines of the Boulevard represent the actual cut and fill proposed to be made at those points. The fill is indicated by the letter "F" the cut by the letter "C." The figures are in feet and decimals thereof. The grade of Meyer Boulevard from Brooklyn to Swope Parkway is substantially as shown on the plat.

[fol. 105] Brooklyn and Swope Parkway are practically on the same level but the grade of the Boulevard dips down at Prospect about 8 feet and then starts to rise again to Swope Parkway. It is

practically a plane from Brooklyn to Prospect and from Prospect to Swope Parkway.

There is a profile on the lower margin of the map to indicate the grade on the north and south roadway of the Boulevard. The upper heavy line is the north roadway and the lower line is the south roadway. The roadways are 150 feet apart and the profiles are considerably different. The width of the entire Boulevard is 220 feet and the space between the roadways is perhaps 70 feet.

The dotted lines on each side of the outline of the Boulevard in white indicates the toe of the slope from the embankment made to bring the proposed Boulevard to grade, that is to say, this dotted line appearing north of the Boulevard in Tracts 17 and 18 represents a fill at those points and that was about the toe of the slope or bottom of the slope of the proposed fill. The same is true of the dotted line just south of the Boulevard. Of the property along the north side of the Boulevard approximately 2,600 of the 5,500 feet is below grade. Of the property on the south side of the Boulevard approximately 3,200 feet is below grade. This appears from the profile shown at the bottom of the plat.

The names on this Exhibit 12 appear just as they were shown on the original plat; they are exact copies. Those names are the names of the owners of the tracts and in some cases of the lessees.

All of the distances and areas and amounts to which I have testified have been taken from the measurements on the map and are merely computations.

[fol. 106] Redirect examination.

By Mr. Langworthy:

Q. Mr. Woodward, just one or two more questions: do I understand that Meyer Boulevard from Brooklyn to Swope Park has now been graded the entire width of the boulevard? That is, between these lines indicated here the entire width of the boulevard? What I am getting at, what I want to know is, whether it has been graded, just a roadway itself, or whether it is graded for the entire width of the boulevard?

A. Graded for its entire width.

Q. Graded for its entire width; now then, I wish to you would state to the Court, beginning at Brooklyn or beginning at the extreme west point of Meyer Boulevard in this benefit district, state to the Court, if you can, the width of the actual roadway or road which is paved and in use on each side of the boulevard?

Mr. Bowersock: I think we are going to object to that as being entirely irrelevant.

Mr. Langworthy: It seems to me very material, because it will show a very large part of this grading was not a roadway or street at all, but grading for a park, because between these two roadways provision was made for a very large roadway or park and I think it is material for Your Honor to know what the determining issues before you are as to what part of this grading was taken for a road-



way or park and what part was taken for a boulevard. We claim it was really an extension of Swope Park.

The Court: Very Well. He may answer, subject to the objection.

To which last action and ruling of the Court, the Defendants, and each of them, by their counsel, at the time duly excepted, and still except.

Q. I wish you would state those figures to the Court, if you will, Mr. Woodward?

[fol. 107] A. In that portion of the boulevard having a width of 220 feet, which is the greater part of its length, the roadways on both the north and south sides are 40 feet inside of the property line and these roadways are macadam, having a width of about thirty feet, which leaves, approximately eighty feet at the present time between the roadways.

Q. Do I understand that the distance between the property line and the roadway proper is about forty feet?

A. Forty feet.

Q. And then the roadway, which is about thirty feet wide?

A. About thirty.

Q. And for the parkway in between the two roadways, the width of that is about eighty feet?

A. About eighty feet.

Q. And then roadway thirty feet and then the distance to the other side?

A. Yes sir.

Q. What is there between the park line and roadway, this distance of forty feet you have mentioned?

A. Both the parkways and the center parkway are now in alfalfa.

Q. In other words between the two lines of the yellow where it is 220 feet wide you have a roadway along the south line about thirty feet in width and a roadway along the north line about thirty feet in width?

A. Forty.

Q. Forty; and the remaining part is just grass and alfalfa?

A. Yes sir.

Q. Now then, how is it with respect to that part of the boulevard that is five hundred feet in width just before it reaches Swope Park? There is how much taken up in roadways and how much taken up in grass or parkway?

[fol. 108] A. As these roadways coming from the west approach Swope Park and in about 700 feet west of Swope Parkway they diverge, swinging out away from each other around an oval egg-shaped piece perhaps 350 feet in width and then converge again at Swope Parkway. This center parkway perhaps being 500 feet east and west and nearly 350 feet north and south.

Q. How much ground, measured, if you are able to give it, is there between the roadways just before they enter Swope Park as they widen out here at this wider part of the boulevard?

A. At their widest part I didn't measure it. My opinion is that it is at least 800 feet apart.

Q. Now what I want to get at, If you can state it, is approximately the number of acres embraced between the parkways where they separate and come around this oval egg-shaped piece you have testified to?

A. Three or four acres.

Q. There is three or four acres embraced between the roadways in this wider part of the boulevard just before you enter Swope Park?

A. That would be my opinion.

Q. Now are the driveways themselves of the same width at this point where they enter this part of the boulevard 500 feet in width?

A. The same width, yes; approximately 30 feet.

Q. 30 feet all the way clear up to the entrance to Swope Park?

A. Yes sir.

Q. Mr. Woodward, could you state to the Court how many acres beginning now at the west end of the boulevard; that is, the west end of the benefit district, can you state to the Court how many acres there are embraced within the boundary lines of Meyer Boulevard that are in alfalfa or in grass as distinguished from the part that is actually used for roadways?

A. I would say there were perhaps twelve or fifteen acres.

Q. Twelve or fifteen acres of that number that are in grass or alfalfa?

A. Yes sir.

[fol. 109] Q. Now can you state the total area that is graded by Meyer Boulevard within this benefit district?

A. I have just been guessing at this, I better do a little figuring.

Q. I want you to give it as near accurate as you can?

A. Total area graded is approximately 32 acres and the total area of the roadways is approximately 9 acres, so I would have to correct my statement as to the area in alfalfa and grass and say that that area is perhaps about 23 acres instead of 12 to 15.

[fol. 110] On Recross examination Mr. Woodward testified as follows:

My figures as to the size of the roadways and as to the spaces between the roadways are based upon my knowledge of the conditions and the ground and are not taken from the map. This map shows the roadways according to the proposed plan for improvement which was not followed in construction. The roadways are in the same position as planned except that the inner 10 feet or so of the roadways has not been constructed. Where the plan was for a roadway of 40 feet in width the inner 10 feet has been left off to be added when the traffic so warranted. The entire roadway might be paved for traffic and the entire space between the roadways could be paved if the traffic so demanded. Up to date, however, there has not been as much paving of the highway as the original plans called for.

Thereupon Complainants offered in evidence certain extracts from the official public report of the Board of Park Commissioners for the year 1914. This was admitted in evidence over the objection of the defendants.

The extracts admitted are shown at page 32 and at pages 42 to 46 inclusive of said report. At Page 32 of said report appears the following:

#### EXHIBIT IN EVIDENCE

"From the Paseo east into the 65th Street entrance to Swope Park, this width is 220 feet and its improvement as planned carries two roadways with a central parking between, thus diversifying the line. This great east and west reach receives practically all of the north and south lines of boulevards and parkways. Every one of these lines of boulevards and parkways throughout the entire system are really merely connections between Swope Park on the southeast and the business district of the city on the northwest."

At pages 42 to 46 of said report appears the following:

[fol. 111]

#### "Swope Park

Since 1896, the year in which Mr. Swope's munificence secured to Kansas City its great outlying playground, the community has spent a very considerable sum in the development of this property. Its 1,332 acres, however, requires so long a time and so great means that comparatively little has really been accomplished.

With this, however, the property has been constantly increasing in favor of the public and used to such a very great extent that material improvement becomes essential with every year.

Today the northwesterly area of the park is well provided with roadways, with great picnic groves and the bluegrass meadows characteristic of this section of the country. It has even with those comparatively limited improvements become so attractive in all its forms of recreation and good appearance that the Kansas City public with every opportunity makes most liberal use of this as a playground.

The presence of the Zoological Park within this property has established in its northern district a center to which everyone comes. Its roadway system to that point is excellent. The Zoo is serving as a tremendously attractive feature. With it there should be an aquarium display as well as the animals and birds, becoming a part of the Zoo group of buildings already in place. In addition to this there should be provision for a possible botanical garden with its display of outdoor as well as indoor plants. This will in time require a group of fine conservatories aside from the propagating houses now serving from Swope Park the entire park system.

The temporary nine-hole golf course along 67th Street has proven [fol. 112] an exceedingly valuable factor in the property's use. The presence of the Shelter Building and its surrounding great gardens, the temporary Refectory Building and the extremely valuable picnic shelter building have all centered practically all of the use of the place in the northern and western section. One minor feature of astonishing importance in the improvement of the property has been in the picnic use of the place. This use has been very greatly facilitated and made comfortable with the existence on the picnic spots of the outdoor cook stoves, giving opportunity for

picnic parties to eat their own cooking at these points. The development of the Lagoon in the natural depression of the lowlands east of Blue River has began to establish another great play center on that district of the northern section of the park. This is made directly accessible so far by a pedestrian bridge across the Blue and the athletic field, together with the Polo field, boat house and general play field have proven exceedingly attractive. The later development and practical completion this year of the new 18-hole golf course on the hills and within the forest on the eastern boundary, further develops the easterly play fields of this great park.

Every additional area brought into use accentuates the necessity for further means of access. Primarily, of course, this calls for roadways and upon their completion the necessary pathways leading from the street railway terminus to all of the play centers.

In connection with these necessities, your particular attention is called to the need of roadway crossings and pathway crossings over the two steam railways, which together occupy a 100 foot right of way through the park, and crossing over the Blue River. The needs in this respect for many years to come will be amply served by [fol. 113] by two bridges—one across the railroad and the Blue together on a line which is approximately 64th Street northeastward of the Zoo and tying the northern section of the park with the playfields and The Lagoon on the east and connecting directly thereby with the Blue Ridge Road which enters the park at its northeastern corner. That portion of this bridge which should span the Blue River may and in the judgment of the writer should be in the form of a memorial, which would give at least a small expression of gratitude to the donor of this great property. The second, and perhaps even still more important bridge at this time is the one prepared for across the railroads and the Blue River where these are adjoining on the line of 71st Street. This line is the thoroughfare from the north and west through the park to the south and east and is absolutely essential in order to replace an old iron country bridge which is not hardly sufficient to properly care for the increasingly great travel on that road, in doing this making possible the elimination of a grade crossing of the two railroads which is and always has been extremely dangerous to all who use this crossing.

There are numerous points of extremely great interest in Swope Park deserving of development and use. None of these, particularly south and southeast, will become available until roadways long planned for are built. Each year by a systematic development of particular sections, material improvements should be accomplished. Even then it will require several generations to complete the improvements which might be considered as a completion of this park.

The building of the street railway, extending this service from [fol. 114] Swope Parkway eastward along 67th Street to the head of the Zoological Park brings about the need for further improvement at that point. The plans have long provided for a park drive adjoining on the north and parallel with this street railway line. In connection therewith, there is also planned what is known as The Mall—a wide shaded pathway with all its attendant conveniences, seats and minor

embellishments, that will naturally and comfortably bring the pedestrians from the gardens and shelter on the west to the Zoo and to less formal gardens and resting place on the ridge to the west of the Zoo which will form the feature of the eastern end of The Mall, as proposed.

From Swope Parkway across the northern boundary of the park for a distance of a fraction over a quarter of a mile there has been completed the boundary park drive with its formal lawn and tree space between that and the distinctive boulevard which serves as the service highway to the abutting private properties on the north. This illustrates one feature of the completion of the boundary surrounding Swope Park. At such time as the City may be able and as quickly as it is possible to supply the funds, the entire boundary line of Swope Park should be similarly improved—not necessarily with double roadways, but with a fine highway dividing the private from the public properties throughout and wherever the topographical conditions of the boundary line make it possible. While necessarily this cannot be accomplished immediately and all at one time, yet there should be consistent effort in the direction of the acquisition of some rights-of-way. The great park properties of the country are all somewhat remote because of this, private lands on the boundaries are only slowly developed. The neglect of fine completion of the public ground on the boundaries of these great [fol. 115] parks has, therefore, invariably led to an indifference or very poor development of the private lands on their boundaries. This should not happen with Swope Park. The boundaries should be given constant and early attention.

Respectfully submitted. George E. Kessler, Landscape Architect."

[fol. 116] Mr. Woodward stated on Re-Direct Examination that according to the map of Kansas City, identified as Exhibit 13 there are in Kansas City approximately 30 or 35 miles of boulevards which would naturally lead into Meyer Boulevard and which have to depend upon, as their shortest line, Meyer Boulevard to get into Swope Park and beyond.

CARRIE SINGER ABERNATHY, being duly sworn and examined on behalf of the complainants testified as follows:

My name is Carrie Singer Abernathy. I am the owner of the two tracts of land referred to on this plat as Tracts 14 and 15, at 63rd Street and Prospect Avenue in Kansas City, Missouri, containing approximately 40 acres. The improvements on the land consist of my home and a stable. The property is also fenced. I have lived on the land ever since 1915 and before that time.

Mr. Langworthy: Mrs. Abernathy, will you state to the Court what use you make of Meyer Boulevard in going to and from your home to the various places that you may go whether to town or otherwise.

**Mr. Bowersock:** I wish to object to that as being incompetent as to what use she actually makes of the Boulevard, that question is not one that is proper. The question is not what use is actually made but what use may be made or can be made of the Boulevard.

The Court permitted the witness to answer over the said objection.

**Mrs. Abernathy** then continued: We do not use Meyer Boulevard at all. 64th Street is not through, nor is 65th Street. Brooklyn is paved but has no entrance to Meyer Boulevard. The only entrance [fol. 117] to our place comes in on Olive. The house virtually would be on Wabash and the driveway comes in on Olive from 63rd Street and in going to and from town we go out the driveway on Olive and go east on 63rd Street to Prospect and take Prospect to the City. Olive and Wabash are not marked on this plat but they are streets which if put through would come through our place between Brooklyn and Prospect extending north and south. People coming to and from our place, guests for example, and people coming for the purpose of making deliveries come out Prospect, not over Meyer Boulevard. Prospect is in excellent condition and people use Prospect in coming out. They do not come out the Paseo because 63rd Street is impassible from the west, impassible because of the paving. The pavement on 63rd Street has been in bad condition for several years.

**Mr. Langworthy:** Mrs. Abernathy, did you have any knowledge or notice of a suit brought in the Circuit Court of Jackson County, Missouri which is referred to as Cause No. 90628, entitled "In the Matter of Grading of Meyer Boulevard" did you have notice of that?

**Mr. Bowersock:** You mean legal notice? We object to that question.

**Mr. Langworthy:** I am asking her whether she had any actual notice.

**Mr. Bowersock:** I object to that as being immaterial.

**The Court:** Overruled; proceed.

Thereupon the witness proceeded as follows:

I had not, I had no notice. I was not given any notice of any proceedings had by the Board of Public Works with reference to the assessment or the placing of an assessed value on my property for the purposes of this proceeding or for the purposes of apportioning the assessment against my property. I did not know anything about the City Assessor making an assessment assessing the value of my [fol. 118] property for the purpose of this proceeding.

The south 20 acres of my tract is in timber and I think has temporary buildings for the stock. In the summer time there is a corn plot on the west 20 acres. In a general way the property is used for farm and pasture purposes, other than that part occupied by my residence. It is unplatted property and has no improvements on it except the residence and outbuildings in connection with the residence. This is generally true of the property out in that neighborhood. It is just open vacant property. Especially is this true of the property between my property and Meyer Boulevard.



On Cross-examination Mrs. Abernathy testified as follows:

I have lived out on this tract something over fifteen years, on the same property. We were among the first people to purchase out there. We purchased of Mr. Harper who owned a good deal of property out there at that time. We were familiar with the land when it was brought and both Mr. Abernathy and myself were very much interested in it. We did not have the pick of all the ground out there but we had a chance to buy the corner property and then later were able to secure the other 20. By the corner property I mean the cleared 20 acres southwest of the corner of Prospect and 63rd Street. We first bought the tract on Prospect, just 20 acres. That was our pick of the ground out there. Then later we bought the other 20 acres.

The house we live in is toward the north of the east 20. The house stands in about the center of the north 10 acres of the tract. There is nothing at all on the south 10 acres of south of what would be 65th Street. 64th Street is the dividing line of the 10 acres. South of 64th Street there is just vacant land. North of 64th Street is our house and the lawn around the house. The west 20 acres is [fol. 119] all timber except for a little cleared at the south end of it. We are not farming the property at all except to keep a little stock and a little garden. The house is a large stone house with red tile roof.

64th Street is not yet open. Prospect Avenue is paved in front of our property down to Meyer Boulevard. Brooklyn was paved by the property owners some years ago, but since Meyer Boulevard was cut through we cannot get down possibly, there is no entrance onto Meyer Boulevard from Brooklyn, and there is no entrance from 65th Street west into Meyer Boulevard. You can't get through from Brooklyn, you can get through only on 63rd Street. As our ground is now being used the entrance to our driveway is on 63rd Street, considerably west of Prospect, approximately at 63rd Street and Olive.

[fol. 120] WALTER DOBBS, being duly sworn and examined on behalf of the Complainants testified as follows:

My business is that of commercial photographer. I am with the Acme Photo Company at the present time. I have taken certain photographs along Meyer Boulevard between Brooklyn and Swope Parkway at Mr. Thomson's request. These photographs were taken about a year ago. The photograph marked Exhibit 16 is made from just south of Meyer Boulevard looking east at a point about Brooklyn, I would judge. Exhibit 17 is made from the same point approximately except that it is looking northeast instead of east. Exhibit 18 is looking east from a point just west of Prospect Avenue on the south side of Meyer Boulevard. Exhibit 19 is looking almost north, a little east, from a point just west of Prospect Avenue on the south side of Meyer Boulevard. Exhibit 20 is looking east on Meyer Boulevard from between the drives about a block or a block and a half west of Swope Park entrance. It shows the entrance to Swope Park. Ex-

hibit 21 is taken from the entrance of Swope Park looking west. It shows the roadways as they curve around as they come toward the entrance to Swope Park. Exhibit 22 is made from a point about two blocks north and west of the entrance of Swope Park looking northwest, showing a point near the center of the photograph which is what I believe is golf links or golf course, wherever that is. It is taken from the north of Meyer Boulevard, probably two blocks north and west of Swope Park about the same distance as near as I can remember. Exhibit 23 is taken from a point a little further north from Exhibit 22 looking southwest. These photographs correctly represent what they purport to represent.

Complainants thereupon offered in evidence the photographs referred to by the witness and they were admitted in evidence as Exhibits 16 to 23 inclusive, and are hereto attached and made a part hereof.

[fol. 121] On Cross-examination Mr. Dobbs testified as follows:

Mr. Thomson picked out the locations from which to take these photographs; he was with me at the time. He picked out the locations and the directions in which to point the camera. From some of the pictures you can tell something about the cuts and fills along the boulevard. Exhibit 17 is taken from a point above the level of Meyer Boulevard. It is taken on a bank just south. From the shady parts in the picture I can tell something about the height of the bank. Also from Exhibit 18. It is clear that the bank is about 8 feet above the boulevard, or perhaps 6 or 7 feet. The poles shown in the pictures are trolley poles on Prospect Avenue. The camera is up as high as the white line on the poles. In Exhibit 18 the dark place at the right of shelter house as it appears in the picture is a cut. I would judge that it is a cut of about 4 feet. There is nothing in the picture to indicate whether the cut is 4 feet or 6 feet or 10 feet.

[fol. 122] GARRETT ELLISON, being duly sworn and examined on behalf of the Complainants testified as follows:—

I have lived in Kansas City, Missouri 55 years. For the last 35 years of that time I have been actively engaged in the real estate business. I have been familiar with real estate and real estate values in and around Kansas City for a number of years. I have recently examined and gone over the benefit district provided for in this proceeding, and the property generally in that vicinity. I have further made a study of the situation as it exists out there, and as it has existed during the past few years.

In a general way it may be said that 95% or more of the population of Kansas City is north of Meyer Boulevard as compared with the portion of the population south of the Boulevard. About 98% of the area of the City is north of the Boulevard; perhaps also 98% of the population. About the same percentage of the population lies north of 63rd Street.

With regard to the improvements on the tracts in the benefit dis-



trict as shown in Exhibit 12 I would state that on Tract 14 is the Abernathy home; on Tract 1 is a church and parsonage. The property is all vacant with these exceptions. No houses or improvements have been built in this district since Meyer Boulevard was graded and paved is as the Main entrance to Swope Park. The use to which Meyer Boulevard had been put since it has been graded and paved is as the Main entrance to Swope Park. The travel over Meyer Boulevard to Swope Park is the outlet largely of the boulevards running north and south through the City. The traffic is very largely from the City at large practically, all from [fol. 123] the City at large. On Sunday afternoons and Holidays as well as on days during the week large numbers of people go to Swope Park and there is a continuous procession east and west on this boulevard. Swope Park, as we all know, is the great playground of Kansas City. It is a very large park containing approximately 1,200 acres. It was donated to Kansas City by Thomas Swope a good many years ago, about 1896. Meyer Boulevard is the main entrance to Swope Park from the City. Entering the Park the road diverges, one road going on the west to the shelter house and the other continuing east down towards the band stand and playgrounds. There are two public golf links within the Park; there are driveways all around through it. It is a large park to which the people naturally go on Holidays as a public play-ground.

The section south of the Boulevard away from the City would naturally use the Boulevard more than the property north of it. The Boulevard is primarily an entrance from the City at large to Swope Park. The property east of Brooklyn Avenue to Swope Park and south of the Boulevard would naturally use the Boulevard in going to and from the city more than the property north of it.

Mr. Langworthy:

Q. Now, referring to the tracts north of the Boulevard which do not abut on the Boulevard, I call your attention particularly first to Tracts numbered 14 and 15 known as the Abernathy tract. I wish you would state to the Court whether in your opinion that tract received any special benefit as distinguished from general benefits received by the community at large by virtue of the improvement consisting of the grading of Meyer Boulevard. I want you in answering the question to distinguish between the improvement benefit arising from the condemnation, confining it only to the benefit, if any, arising from the actual grading of Meyer Boulevard.

[fol. 124] Mr. Bowersock: I object to that as calling for the conclusion of the witness and as being contrary to the provisions of the Charter as to the method of determining benefits.

Mr. Langworthy: Well, if I can show there were no special benefits received by this property, that they didn't amount to 5¢ and were assessed for \$12,000 it seems to me it is of some importance to Your Honor in determining whether or not that benefit district is an unreasonable benefit district.

The Court: I will hear the evidence. The objection is overruled. You may answer it.

To which last action and ruling of the Court the defendants and each of them by their counsel at the time duly excepted.

A. The benefit accruing from Meyer Boulevard to Tracts 14 and 15 is largely a general benefit. There may be a very slight local benefit, but it would be very small. The property would have brought very little more after this improvement than before, if any. Before this improvement was made there were two ways of reaching Swope Park, one going from Swope Parkway to 63rd Street. 63rd Street was a heavily traveled thoroughfare at that time, but since Meyer Boulevard was graded that traffic has very largely left it and gone to Meyer Boulevard. However, that is partly accounted for by the fact that 63rd Street at present is badly out of repair. But immediately after the building of Meyer Boulevard the car traffic left 63rd and went over to Meyer Boulevard.

The same rule applies in my judgment to Tract 11 as to Tracts 14 and 15. That is, after the improvement the property would not have sold on the market for any appreciable amount more because of the grading. The same situation also applies to Tract No. 8 and Tracts 2 and 3. I think the benefit from Meyer Boulevard to those tracts, that is the special benefit, was very slight.

[fol. 125] Swope Parkway is a street 150 feet wide east of Tracts 2 and 3, with a double street car *tract* in the center and a paved roadway on either side, with sidewalks and curbing. Prior to the opening of Meyer Boulevard, Swope Parkway was the leading thoroughfare to Swope Park. It was graded and paved and was used by people going through the Park. After Meyer Boulevard was completed the traffic over Swope Parkway very largely left it and went to Meyer Boulevard; probably 75 of 80% of vehicle traffic left Swope Parkway. Of course the street car traffic was not affected. In my opinion the opening of Meyer Boulevard had a detrimental effect on the two tracts which fronted on Swope Parkway, that is, it had a detrimental effect on their selling value. The grading of Meyer Boulevard would, I think, be a serious damage to the property abutting on Swope Parkway inasmuch as traffic was taken off of Swope Parkway. I think in time the frontage of Swope Parkway would become business property. Tracts 2 and 3 lend themselves very nicely to some large development. The sale of property on Swope Parkway south of Meyer Boulevard from the south line is developing now and is business property as is reflected in the prices asked for the property. If it were possible to convert the Swope Parkway frontage of Tracts 2 and 3 into business property that would have a damaging effect on the balance of Tracts 2 and 3 for residence purposes for the reason that business always hurts residence property. If any advantage was gained by reason of converting Swope Parkway and the frontage of these tracts into business you would get an equally detrimental effect and the balance of the tracts would be less desirable for residence purposes and sell for less money.

The lessening of traffic on Swope Parkway would not in my opinion damage Tracts 2 and 3 very much as residence property.

[fol. 126] Mr. Langworthy: Mr. Ellison, will you state what in your opinion was the extent of the special benefit received by property abutting on the Boulevard by virtue of and as a result of the improvement consisting of the grading of Meyer Boulevard.

Upon objection made by the defendants to the admission of the testimony called for by the question the Court ruled as follows:

The Court: It seems to me he can inquire as to comparative actual benefits as to these different tracts and these different locations.

Mr. Bowersock: Mr. Ellison, was all the property abutting on the Boulevard equally benefited whether below grade or above grade or on grade?

Witness:

A. No, sir.

Mr. Bowersock: Then I object to a general statement on the part of the witness as to what benefit the property abutting the Boulevard received.

The Court: He can take the question of grade into consideration in making his answer. He can testify as to the general rule subject to general conditions which may exist as to a specific piece of property.

Witness:

A. The major part of the property facing or abutting on the Boulevard in a general way received the greater part of this benefit from the grading of the Boulevard. Then the property next to that was the property south. The nearer to the Boulevard the greater the benefit. Next to that the property north and the further you reside north the less the special benefit.

The Court:

Q. Now, Mr. Ellison, how would that be affected if property fronting on the Boulevard was in a disadvantageous position with respect to grade?

Witness:

A. Of course, where some of these grades, these cuts and fills are [fol. 127] very heavy the property is practically worthless. Where the cut, for instance in the 23rd Street Traffic-way is 50 feet, in that case I testified that that property is ruined, its value taken away, and in that case we allowed the property owner the full value. No such cuts or fills exist on Meyer Boulevard as I refer to on the 23rd Street Trafficway.

The Court: Are there any such cuts and fills as would seriously influence your view as to the benefit accruing?

Witness:

A. Of course the grading of the Boulevard would make the corners more valuable on the Boulevard and there is a great deal wider space graded than there is within the limits of the Boulevard itself. They graded back on either side quite a ways, just how far back I don't know.

Mr. Langworthy: As a matter of fact, just taking these pictures to refresh your recollection isn't the property on both sides of the Boulevard practically of the same depth throughout its entire length?

Mr. Bowersock: I object to that. The profile shows what the cuts and fills are and the photographs do not.

The Court: Well, I think the best evidence of that is the mathematical situation as shown by the plat.

Witness: I don't think the plat shows the exact condition there from the fact it shows the condition there at the time that the grade was contemplated, but in grading through there they graded and filled beyond the limits of the Boulevard.

Mr. Bowersock: I certainly object to any testimony of that kind.

The Court: I have before me what the plans and specifications were and I want also to hear what the actual situation is there as bearing upon the situation of the land after this improvement. As to how the contractor left the land, the presumption is he did the work pursuant to his contract.

[fol. 128] Witness: Well, Your Honor, he did go back a good deal more, he graded back from those lots for a considerable distance. In driving along the Boulevard from Brooklyn to the Paseo all the property seems apparently very close to grade. Back from the Boulevard there are places where it is below grade. To the north it is above grade. When I drove by there immediately after the grading of the Boulevard I found that someone had graded back for a long distance on either side, but abutting the lines of the Boulevard the property is left practically all on the grade of the Boulevard.

Mr. Mr. Bowersock: I object to that as not referring to any lot specified or named in the petition or any lot covered by these proceedings, or applied to any lot with which any comparison can be made.

The Court: Of course I don't think the court can pass on a situation of that kind except by some specific description of the property to be graded or platted.

On Cross Examination Mr. Ellison testified as follows:

Tracts 2 and 3 are principally residence property. It is all residence property at the present time with a tendency for some business to come in on Swope Parkway. If business should come in on Swope Parkway that would tend to injure the rest of the property as residence property.

This property north of Meyer Boulevard and up to 63rd Street is

at the present time beautiful land for residence purposes and is high and beautifully located.

Prior to the construction of Meyer Boulevard traffic on Swope Parkway near the entrance to the Park was very congested. Swope Parkway was the main entrance to Swope Park. The opening of Meyer Boulevard has very materially decreased the traffic on Swope Parkway.

The land south of Meyer Boulevard, say for example that in [fol. 129] parcels 6 and 10 slopes to the south towards 67th Street. Tracts 13 and 19 also slope to the south. 67th Street all along is lower than Meyer Boulevard, quite a little lower. South of 67th Street the property is built up and the streets are improved. The land south of 67th Street has been platted and is considerably occupied by homes. The residences there are medium priced until you get down to 67th Street and Swope Parkway where there is a business center.

Mr. Bowersock: Now you testified you thought a major part of the benefit, as I remember it, the greater part of the benefit to the property there from the building of Meyer Boulevard was to the property next to the boulevard?

Witness: Yes sir.

Mr. Bowersock: This plat, Mr. Ellison, at about the middle of Tract 6 shows a fill on Meyer Boulevard of 26 feet.

Witness: Those cuts and fills at the present time aren't apparent from the Boulevard.

Mr. Bowersock: If there is a fill of 26 feet or of 22 feet or 17 feet there can you run a street through Tract 6 up into Meyer Boulevard as a practical matter?

Witness: If those facts exist all through that tract, it would be difficult. You could run them of course.

Mr. Bowersock: The plat shows here in Tract 13 that there is a cut of 16, 17 and 18 feet along there for a considerable distance of two or three hundred feet.

Witness: That is largely graded out now. I don't know the conditions of course under which it was graded down. I don't know whether the owner of the lot paid for the grading or not. When the street was opened up however it was in that condition. There is a very severe grade from 67th Street up to Meyer Boulevard.

Mr. Bowersock: If you had to go from Tract 10 down to 67th [fol. 130] street onto what is now Swope Parkway and over to Meyer Boulevard the distance from Tract 10 to Meyer Boulevard would be practically as far as the distance from Tract 14 to Meyer Boulevard wouldn't it?

Witness: The difference between those two tracts is this, that people residing on Tract 10 go north and west to the City the same as 14. 14 wouldn't come to Meyer Boulevard at all while 10 would. If 63rd Street were in good condition as it was for a long time I think people would go west to the Paseo instead of East to Prospect. The condition of the streets makes a difference of course in the route which people will travel.

The property along Meyer Boulevard is all susceptible of being

divided up into fine residence property when it is properly graded and platted.

Plaintiffs thereupon offered in evidence a certified copy of all record entries in Cause No. 90627, in the Circuit Court of Jackson County, Missouri.

The evidence was objected to by the defendants as being immaterial to any issue in the case but the objection was overruled and the certified copy admitted as Plaintiffs' Exhibit 24, which is substantially as follows:

[fol. 131] PLAINTIFFS' EXHIBIT NO. 24 TO ELLISONS' TESTIMONY

Be it remembered that on the 33rd day of the regular January Term, 1915, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 17th day of February, 1915, the following proceedings were had and made of record before Hon. Thomas J. Seehorn, Presiding Judge of Assignment Division, in the cause entitled:

Assignment Division

No. 90627

In the Matter of the Proceedings under Ordinance of Kansas City, Missouri, No. 21831, Approved January 28, 1915, Entitled. "An Ordinance to grade MEYER BOULEVARD from the West Line of Swope Parkway to the East Line of the Paseo, etc."

Now comes Kansas City, Missouri, by its Assistant City Counselor, Jay M. Lee, and files with the Court a certified copy of the aforesaid Ordinance: also a map or plat descriptive of said proceedings.

Thereupon, it is ordered by the Court that this proceeding be and now is assigned to Division numbered Nine (9) of this Court, for further hearing herein.

On the 33rd day of January Term, 1915, the same being February 17th, 1915, the following further proceedings were had and made of record in Division Number Nine, in said cause No. 90627.

Now, on this 17th day of February, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division No. 9, comes Kansas City, Missouri, by its Assistant City Counselor, Jay M. Lee, and shows to the Court that its Mayor has caused to be filed in this court a certified copy of the aforesaid Ordinance No. 21831, approved January 26, 1915, together with a statement by map containing a correct description of the several lots or parcels of private [fol. 132] property within the benefit limits prescribed by said Ordinance, and the court thereupon makes the following order herein, to-wit:

To all persons whom it may concern, Greeting:

Whereas, a certified copy of an ordinance of Kansas City, Missouri, numbered 21831, approved January 26, 1915, entitled: "An ordinance to Grade Meyer Boulevard from the West line of Swope Parkway to the East line of The Paseo and to condemn easements to support embankments or fills, describing the nature of the improvement, providing how the cost thereof shall be paid, and prescribing the limits within which private property is deemed charged to pay damages caused by said grading, and by the condemnation of said easements, and assessed and charged to pay the cost of said improvement," was by the Mayor of Kansas City, Missouri, caused to be filed and presented to this Division No. 9 of the Circuit Court of Jackson County, Missouri, at Kansas City, the general object and nature of said Ordinance being to provide for the grading of the aforesaid Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, to the established grade thereof and for the condemnation of easements to support embankments or fills, as specified in said ordinance, and providing that said proposed improvement shall be paid for in special tax bills against the lands chargeable therewith according to law, as provided by the Charter of Kansas City, and particularly as provided in Section 28, Article VIII of said Charter, and for the ascertaining and assessing of damages and benefits that may arise from said proposed improvement; and that private property may be disturbed or damaged by said proposed improvement and the owner or owners thereof and parties interested may be entitled to remuneration or damages; and that the limits prescribed and determined by said ordinance within which private property is deemed benefited by said proposed improvement [fol. 133] and may be assessed to pay said remuneration are as follows, to-wit:

(Here follows description of benefit district as shown in Plaintiff's Exhibit No. 12.)

Now, therefore, all and each of you are hereby notified that the 8th day of March, 1915, is the day, and the courtroom of Division No. 9 of this Court in the County Court House in Jackson County, Missouri, at Kansas City, is the place hereby fixed by said Court for the ascertaining and assessing of the damages and benefits that may arise from said proposed improvement, and from the condemnation of said easements, and that unless before the day set for the hearing as aforesaid, or before the day to which said cause may be postponed or continued, you file with the Clerk of said Court your claim or claims for damages, containing a description of the property claimed to be damaged and the interest of the claimant therein, you and each of you shall be forever precluded from making any claim for remuneration on account thereof, and that property assessed with benefits to pay such remuneration will be sold if the assessment is not paid.

And the Court further orders that this order be published in each issue of The Daily Record, the newspaper at the time doing the city



printing, for ten (10) days, the last insertion to be not more than one (1) week prior to the day herein fixed for said hearing, and a copy of this order be served as by the Charter of said city provided, on each and every resident of the city owning or having an interest in the real estate fronting on that part of the aforesaid Meyer Boulevard proposed to be graded under these proceedings.

On the 46th day of the January Term, 1915, the same being March 5th, 1915, the following further proceedings were had and made of record in Cause No. 90627.

[fol. 134] Comes now Thomas H. Swope, as owner of property affected by this proceeding, and files herein his claim for damages.

And comes R. W. Hocker as owner of property affected by this proceeding, and files herein his claim for damages.

On the 1st day of the March Term, 1915, the same being March 8th, 1915, the following further proceedings were had and made of record in Cause No. 90627.

Now on this 8th day of March, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City in Division numbered Eight(8), comes the said Kansas City by its City Counselor, and come all persons and parties concerned herein.

And the said Kansas City now files and submits to the Court proof of lawful publication and personal service of the orders of the Court herein made on the 17th day of February, 1915, and the Court finds that same were made as the law requires and deems no further notice herein advisable.

And for good cause shown, it is ordered that this proceeding be, and it now is adjourned to Monday, the 15th day of March, 1915, at 9:30 o'clock in the morning of said day, at the aforesaid court room, to empanel a jury herein.

On the 7th day of the March Term, 1915, the same being March 15th, 1915, the following further proceedings were had and made of record in Cause No. 90627.

Now on this 15th day of March, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division numbered Nine (9), comes the said Kansas City by its City Counselor, and comes all persons and parties concerned herein:

[fol. 135] Thereupon, the Court duly chooses as the board of commissioners herein. G. V. Musser, J. A. W. Eames, James H. Rout, J. A. Minor, Lee Koehler and C. H. Whitehead, six good and lawful men, disinterested freeholders in the said Kansas City, well qualified, who now appearing in Court, are duly sworn and empaneled as the board of commissioners herein.

And the Court directs the said Board of Commissioners to examine personally all property claimed to be damaged by the proposed grading as well as that to be assessed with benefits in this proceeding before making its report, and to return into court at the aforesaid court room on Monday, the 29th day of March, 1915, at 9:30 o'clock in the morning of said day; to which time and place, for good cause shown, it is ordered that this proceeding be and it now is adjourned, for trial.

On the 11th day of the March Term, 1915, the same being March



19th, 1915, the following further proceedings were had and made of record, in cause No. 90627.

Comes Nannie B. Harper, Rachael Z. Furnish and Elizabeth H. Furnish and file herein their claims for damages.

On the 19th day of March Term, 1915, the same being March 29th, 1915, the following further proceedings were had and made of record in cause No. 90627.

Now on this 29th day of March, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division Numbered Nine (9), comes the said Kansas City, by its City Counselor, and come all persons and parties concerned herein; and comes also the board of commissioners herein.

[fol. 136] The trial of this cause is now had before the Court, and said board of commissioners, and all the claims for damages, the proofs and evidence, the instructions of the Court, the arguments of counsel, and all matters are fully heard.

Thereupon, the Court directs the said board of commissioners to return into Court at the aforesaid courtroom on Saturday, the 24th day of April, 1915, at 9:30 o'clock in the morning of said day, and to then and there render and deliver to the Court its report and verdict herein.

And for good cause shown, it is ordered that this proceeding be and now is adjourned to Saturday, April 24, 1915, at 9:30 o'clock in the morning of said day, at the aforesaid courtroom, for a verdict.

On the 41st day of the March Term, 1915, the same being April 24th, 1915, the following further proceedings were had and made of record in Cause No. 90627.

Now on this 24th day of April, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division numbered nine (9), comes the said Kansas City, by its City Counselor, and come all persons and parties concerned in this proceeding; and comes the board of commissioners herein.

And the said Board of Commissioners now renders and delivers to the Court its report and verdict herein, which report and verdict is now filed.

On the 44th day of the March Term, 1915, the same being April 28th, 1915, the following further proceedings were had and made of record in Cause No. 90627.

Comes Now Thomas H. Swope, defendant herein, and files his motion to set aside the verdict of the board of commissioners filed herein and grant a new trial hereof; also his motion in arrest of judgment.

[fol. 137] On the 45th day of the March Term, 1915, the same being April 29th, 1915, the following further proceedings were had and made of record in Cause No. 90627;

Comes now R. W. Hooker, defendant herein, and files his motion to set aside the verdict of the board of commissioners herein and grant a new trial hereof.

On the 6th day of the May Term, 1915, the same being May 15th, 1915, the following further proceedings were had and made of record in Cause No. 90627.

Now on this 15th day of May, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division numbered Nine (9), comes the said Kansas City, by its City Counselor, and come all persons and parties concerned herein.

And the motion of defendant Thomas H. Swope to set aside the judgment rendered herein, and grant a new trial hereof, is by the court taken up, heard, considered and sustained, for the reason the verdict of the board of commissioners herein was against the evidence and the damages allowed inadequate; to which ruling of the Court the said Kansas City now duly excepts and objects.

And the motion of the said Thomas H. Swope in arrest of judgment, is now by the Court taken up, heard, considered and overruled; to which ruling of the Court the said Thomas H. Swope now duly excepts and objects.

And the motion of defendant, R. W. Hocker, to set aside the verdict herein rendered and grant a new trial hereof, is now by the Court taken up, heard, considered and sustained, for the reason the verdict of the board of commissioners herein was against the evidence, and the damages allowed inadequate; to which ruling of the court the said Kansas City now duly excepts and objects.

[fol. 138] Thereupon, it is ordered by the Court that the verdict of the Board of commissioners rendered herein on the 24th day of April, 1915, be, and the same is set aside and held for naught.

And for good cause shown, it is further ordered that this proceeding be and it now is adjourned to Saturday, the 22nd day of May, 1915, at 9:30 o'clock in the morning of said day, at the aforesaid courtroom, to empanel a board of commissioners herein.

And comes B. T. Whipple, and files herein his affidavits.

On the 12th day of the May Term, 1915, the same being May 22nd, 1915, the following further proceedings were had and made of record in Cause No. 90627.

Now on this 22nd day of May, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division numbered Nine (9), comes the said Kansas City by its City Counselor, and come all parties and persons concerned herein.

Thereupon, the Court duly chooses as the board of commissioners herein, William A. Wilson, Frank Updegraff, S. H. Hogsett, George H. Devol, John T. Sears and C. A. Cowan, six good and lawful men, disinterested freeholders in the said Jackson County, well qualified, who now appearing in Court, are duly sworn and empaneled as the Board of commissioners herein.

And the Court directs the said board of commissioners to examine personally all property claimed to be damaged by the proposed grading, as well as that to be assessed with benefits in this proceeding before making its report, and to return into Court at the aforesaid courtroom on Wednesday, the 2nd day of June, 1915, at 9:30 o'clock in the morning of said day, to which time and place, for good cause shown, it is ordered that this proceeding be and it now is adjourned, for trial.

[fol. 139] On the 20th day of the May Term, 1915, the same being

June 2nd, 1915, the following further proceedings were had and made of record in Cause No. 90627.

Now on this 2nd day of June, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division numbered Nine (9), comes the said Kansas City by its City Counselor, and come all persons and parties concerned herein; and comes also the board of commissioner- herein.

And for good cause shown, it is ordered that this proceeding be and it now is adjourned to Monday, the 14th day of June, 1915, at 9:30 o'clock in the morning of said day, at the aforesaid courtroom, for trial.

On the 30th day of the May Term, 1915, the same being June 14th, 1915, the following further proceedings were had and made of record in Cause No. 90627.

Now on this 14th day of June, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division numbered Nine (9), comes the said Kansas City by its City Counselor, and come all persons and parties concerned herein; and comes also the board of commissioner- herein.

And a trial of this cause is now had before the said Board of Commissioners and the Court, and all the claims for damages, the proofs and evidence, the instructions of the Court, the arguments of counsel, and all matters are fully heard.

And the Court thereupon, directs the said Board of Commissioners to return into Court at the aforesaid courtroom on Monday, the 21st day of June, 1915, at 9:30 o'clock in the morning of said day, and to then and there render and deliver to the Court its report and verdict herein.

[fol. 140] And for good cause shown, it is ordered that this proceeding be and it now is adjourned to Monday, June 21, 1915, at 9:30 o'clock in the morning of said day, at the aforesaid courtroom, for a verdict.

On the 35th day of the May Term, 1915, the same being June 21st, 1915, the following further proceedings were had and made of record, to-wit: Cause No. 90627.

Now on this 21st day of June, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division numbered Nine (9), comes the said Kansas City by its City Counselor, and come all persons and parties concerned herein, and comes also all persons and parties concerned herein, and comes also the board of commissioners herein.

And the said board of commissioners now renders and delivers to the Court its report and verdict in this proceeding, which report and verdict is duly filed.

On the 38th day of the May Term, 1915, the same being June 24th, 1915, the following further proceedings were had and made of record in Cause No. 90627.

Now comes Thomas H. Swope, defendant herein, and files his motion for a new trial hereof, also his motion in arrest.

On the 46th day of the May Term, 1915, the same being July

10th, 1915, the following further proceedings were had and made of record in Cause No. 90627.

Now on this 10th day of July, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division numbered Nine (9), comes the said Kansas City by its City Counselor, and come all persons and parties concerned herein.

[fol. 141] And the motion of Thomas H. Swope, defendant herein, to set aside the verdict of the jury herein on the 21st day of June, 1915, and grant a new trial hereof, is by the Court taken up, heard, considered and overruled, to which ruling of the Court the said Thomas H. Swope now duly excepts and objects.

And the motion of the said Thomas H. Swope in arrest of judgment herein, now by the Court taken up, heard, considered and overruled, to which ruling of the Court the said Thomas H. Swope now duly excepts and objects.

On the 47th day of the May Term, 1915, the same being September 11th, 1915, the following further proceedings were had and made of record, in Cause No. 90627.

Now on this 11th day of September, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division numbered Nine (9), comes the said Kansas City by its City Counselor, and come all persons and parties concerned herein.

And all motions to grant a new trial hereof; all motions in arrest of judgment herein having been by the Court overruled and excepted to, and no cause to the contrary now appearing, it is considered, adjudged and decreed by the Court that the verdict of the Board of Commissioners filed herein on the 21st day of June, 1915, be, and the same hereby is in all things confirmed and approved; and said verdict is by the Court adjudged to be binding and conclusive upon each and all of the persons and parties concerned in this proceeding, and upon each and all of the persons and parties holding under them, or either or any of them.

[fol. 142] It is further ordered by the Court that said verdict be entered upon the records of this court, which is now here done, in the words and figures following, to-wit:

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, DIVISION  
No. 9

No. 90627

In the Matter of Grading of Meyer Boulevard from the West Line of  
Swope Parkway to the East Line of the Paseo

#### REPORT OF COMMISSIONERS

The undersigned, freeholders of Kansas City, State of Missouri, having been heretofore duly appointed Commissioners to estimate whether any, and if any, how much damage will be caused claimants herein by reason of the grading of said Meyer Boulevard in said City, as provided by Ordinance of Kansas City No. 21831, entitled:

"An Ordinance to grade Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, and to condemn easements to support embankments or fills, describing the nature of the improvement, providing how the cost thereof shall be paid, and prescribing the limits within which private property is deemed benefited by the proposed improvement, and assessed and charged to pay damages caused by said grading, and assessed and charged to pay the cost of said improvement," and to provide for the payment of such damages, if any, by the assessment of benefits, submit this report;

Having first been duly sworn to perform the duties justly and impartially and to make a true report; and having examined personally each piece of property described on the plat offered in evidence, and all property claimed to be damaged by the proposed grading of said boulevard, we find the actual damage to each piece of property, for which a claim for damages has been filed, either for and on account of said proposed grading, or for or on account of [fol. 143] the proposed easement, does not exceed the peculiar benefits to said property by reason of the proposed grading, and we, therefore, report no allowance of damages to any piece of property.

Wm. A. Wilson, George H. Devol, Frank Updegraff, Samuel H. Hogsett, John T. Sears, Arthur C. Cowan. Five (5) days' service.

It is now, therefore, considered, adjudged and decreed by the Court, that no person or party recover any damages on account of the grading of said Meyer Boulevard from the west line of Swope Parkway to the East line of The Paseo, and the condemnation of necessary easements, under this proceeding; that all parties and persons be, and they hereby are forever precluded from making any other or further claims for such damages.

It is further ordered that the Board of Commissioners be allowed five days' service herein and discharged; that Kansas City, Missouri, pay all costs of this proceeding.

STATE OF MISSOURI,  
County of Jackson, ss:

I, James B. Shoemaker, Clerk of the Circuit Court, within and for the County and State aforesaid, do hereby certify that the foregoing is a full, true and complete copy of all record entries in the Matter of the proceedings under ordinance of Kansas City, Missouri, No. 21831, approved January 26, 1915, entitled: "An Ordinance to Grade Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, etc.," as the same appears of record in my office, in Condemnation Records No. 9 at Pages No. 335-355-392-395-401-404-414-436-438-440-439-546-553-595-605-606-622 and No. 10 at Page No. 28.

In witness whereof, I hereunto set my hand and affix the seal of [fol. 144] said Circuit Court, at office in Kansas City, this 12th day of April, A. D. 1917.

James B. Shoemaker, Clerk, By ———, Deputy.

[fol. 145] J. C. PETHERBRIDGE, being duly sworn and examined on behalf of the Complainants testified as follows:

I am one of the Assistant City Counselors of Kansas City, Missouri, and as such handle the condemnation and grading proceedings that come under the jurisdiction of the Board of Public Works. I have been Assistant City Counselor for over eight years and during all of that period have personally conducted proceedings for the grading of streets as provided under Section 3 of Article VIII of the Charter, that is the ordinary grading proceedings. I have also conducted proceedings under Section 28 of Article VIII of the Charter. I have filed probably as many as a thousand proceedings under Section 3 of Article VIII. During that same period probably 10 or a dozen or probably more proceedings have been conducted under Section 28 of Article VIII. I have handled quite a number of these myself and a few have been handled by the attorney for the Park Board. All of the big heavy grading cases are conducted under Section 28.

The Charter provides that in cases where the grading and cutting away of earth and rock is so great as to impose too heavy a burden upon the ordinary district as provided in section 3 the Council may upon recommendation of the Board of Public Works provide for the enlarged district under Section 28. This is done only where there is a heavy grading as there was in the Sixth Street Grading case. In that case there was at one point a cut away of about 41 feet. Sixth Street was graded from old Bluff Street to Broadway by taking off 40 feet on the south side of the bluff in some places; in other places the cut was not so great. The 23rd Street Trafficway proceedings are all through but the grading has not yet been done. [fol. 146] The contract for the grading of 23rd Street has not yet been let but when it is the tax bills will be spread over a large district created under Section 28 of Article VIII. My recollection is that the taxing district provided for in connection with the 23rd Street grading is the same as the taxing district provided for in the condemnation of land for that proceeding. The same plan was followed or contemplated in connection with the grading of McGee Street from Admiral Boulevard to 8th Street and in connection with the grading of 8th Street from Grand Avenue to Oak.

The plan followed in the grading of Main Street just south of Union Station was the old plan under Section 3 of Article VIII where the taxing district extended back approximately 150 feet. That was a great mistake. In that proceeding the property was almost confiscated and ever since that time the City has used this other plan. That was one of the largest grading projects ever undertaken by the City. The depth of the cut there at the highest point was 76 feet. The street was graded for a distance of three or four blocks.

On cross-examination Mr. Petherbridge testified as follows:

In all of the proceedings taken by the City under Section 28 of Article VIII the title and form of the petition in the Circuit Court



suit has been substantially the same. I don't mean the exact wording but I do mean that we get them up and file them in the same form. This proceeding was one of the first ones prepared. In all the subsequent proceedings under Section 28 we have followed the same form substantially.

This was one of the first proceedings. We had this sad experience on the Main Street cut to which reference has been made; that was [fol. 147] a tremendous cut out there, a tremendous tax on the abutting property and after making a study of the situation we concluded after thoroughly investigating matters that that was inequitable, that the people living south and the people living north got the benefit of the grading of that street as a main thoroughfare through the town, and we concluded that when other grading cases came on we would endeavor to adopt this other form of taxation because it was more equitable and the newer form has been followed in the big cases.

HERBERT V. JONES, being duly sworn and examined on behalf of the Complainants testified as follows:

I have lived in Kansas City 25 years and have been engaged in the real estate business here 20 years. I have tried to keep in touch with the general situation as to real estate activities and am familiar with real estate values and the values of property generally. I have just served two terms as President of the Real Estate Board of Kansas City and am now chairman of the City Planning Commission. The duties of that commission are rather varied. We are making a study of the entire city in reference to zoning it for business, industrial and residence areas. We also have referred to us all of the plats contemplated for filing. The Commission is an official commission provided for by ordinance and appointed by the Mayor. I have had occasion from time to time to become familiar with various public projects that have been inaugurated here, such as trafficways and the condemnation of land for memorial purposes and for parks and boulevards and have served as City witness for the Park Board in a [fol. 148] number of these projects. I was one of the City's witnesses in the last condemnation proceeding to condemn land for Memorial Park. I have served on condemnation juries at times.

I have made a study of the benefit district provided for the grading of Meyer Boulevard from Brooklyn to Swope Park and have been over the property itself. The traffic over the boulevard is very largely from the City at large. Swope Park is the public play-ground of the City and on the days when the public is using that play-ground Meyer Boulevard is congested. Swope Park contains an extensive system of driveways, walks, lakes, lagoons, ball grounds, tennis courts and zoological museum and groves. As many as fifty to seventy-five thousand people probably frequent Swope Park on a single day Sundays and Holidays.

The other boulevards of the City empty into Meyer Boulevard. I think that without question the property within Swope Park receives special benefit by reason of the grading of Meyer Boulevard.

(This testimony was admitted in evidence over the objection of defendants made at the time.) I think there is no question but that Swope Park is the greatest beneficiary by far in this entire proceeding. I think the entire purpose of the proceeding is to establish a connection between other parts of the city and Swope Park.

I think that considerable of the benefit from the grading of Meyer Boulevard accrued to the property lying south of Meyer Boulevard because the boulevard afforded an outlet to that property to the commercial district of the City. I think that Tracts 14 and 15 receive very little if any special benefit. They have an outlet on Prospect Avenue and on 63rd Street. It would not be the natural tendency of anyone to start away from the City in order to get to it.

From the corner of 63rd Street and Prospect Avenue to the Paseo [fol. 149] along 63rd Street is a distance of about one mile or perhaps three quarters of a mile. The distance from the corner of 63rd Street and Brooklyn to the Paseo is about half a mile. The Paseo is one of the main boulevard thoroughfares that leads to the downtown district.

I think the special benefits, if any, which accrued to Tract 11 from the grading of Meyer Boulevard were very remote. I would say that Tract 2 received absolutely no benefit from the grading. Tract 2 has a frontage on 63rd Street and Swope Parkway and at one time Swope Parkway was the main thoroughfare to the Park. After the establishment of Meyer Boulevard it became almost a side street. The same is true with respect to Tract 3 except that the effect has not been so marked. I should imagine that the south end of Tract 3 may have received some benefit from the improvement because it is close to the entrance of Swope Park, but as you go north the benefit rapidly disappears. I think that the special benefits, if any, received by Tract 8 would be small.

It would be rather difficult to state the exact amount of benefit to these tracts in dollars and cents, but I would say that the amount assessed against the property is not at all commensurate with the benefits received. By this I mean that the benefits are far less than the amount of the tax.

Q. Are you able to say as a real estate man after this improvement, consisting of the grading of Meyer Boulevard, was completed these Tracts 14 and 15, or either of them, could have been sold on the market for substantially any more money than they could have before?

A. I don't think so.

Q. Is that true of the other tracts referred to here, Tracts 2, 3, 8 and 11?

A. Yes, I think that is true.

[fol. 150] Q. What, in your opinion, is the situation as to whether Sixty-third Street as a street has been improved or injured by the putting through of Meyer Boulevard?

A. I think Sixty-third Street has been injured.

Q. Has it, in your opinion, really put it into a class of a side street?

A. That is practically what it is now.



Q. Whereas before was it on one of the principal thoroughfares leading from the southwest part of the city over towards Swope Park?

A. Yes, formerly traffic in that part, in that section went across Sixty-third Street and then to the park.

Q. Isn't it true that since Meyer Boulevard has been put through that the traffic that formerly went over Sixty-third Street almost altogether, if not entirely, goes over Meyer Boulevard to the park?

A. That is my judgment, yes.

Q. I want to ask you about the property fronting on Sixty-third Street for a distance back from the street line of 150 feet and I call your attention to that property as compared with property fronting on the boulevard of the same depth; I wish you would state in your opinion how the special benefits, if any, to the property fronting on Sixty-third Street resulting from this improvement compared to the special benefit, if any, resulting to the property fronting on the boulevard?

Mr. Bowersock: I make the same objection to this comparative testimony.

The Court: Well, I will hear the evidence.

To which last action and ruling of the Court, the Defendants, and each of them, by their counsel, at the time duly excepted, and still except.

A. I would say the property facing on Sixty-third Street 150 feet in depth is not enhanced in value at all by this proceeding, whereas [fol. 151] on Meyer Boulevard it certainly created a market for it as is evidenced by the fact that it has been platted and sold.

Q. When I asked you about the property lying south of the boulevard awhile ago I don't believe I asked you how far south of the boulevard, in your judgment, was the property specially benefited by reason of the proposed improvement; can you state that to the Court?

A. I think all the property south of this improvement that was accessible to the use of it.

Q. Well, can you give us some kind of idea as to how far that would extend, as to whether it would be blocks or miles or can you give us some idea about that?

A. Well, probably at least to Seventy-fifth Street; south of that it might go over to South Paseo and then come into Meyer Boulevard a little further down.

Since the improvement has been made the property abutting on the Boulevard has been platted and streets provided for. I have these plats here with me.

Whereupon the Complainants offered in evidence the plats referred to and over the objections of the defendants they were admitted in evidence as Plaintiff's Exhibits 25, 26, 27, which exhibits are hereto attached and made a part of this record.

The special benefits accruing to the property either north or south of the Boulevard naturally decrease as you get away from the improvement I think.

On cross-examination Mr. Jones testified as follows:

Most of the property lying north of Meyer Boulevard is high, slightly ground and all unplatted. The greater part of it is fine residence property. Of the property in the benefit district south of the Boulevard at Prospect the land is about on a level. At 67th Street [fol. 152] it is probably higher than Meyer Boulevard. As you go east it gradually slopes off toward 67th Street. The elevation of the various tracts varies in comparison with the Boulevard. There is quite a little of the property from 10 to 20 feet below the Boulevard. The property south of 67th Street is platted and built up. Part of it is made up of rather small unpretentious houses.

[fol. 153] This is the part immediately south of Tract 6. Further west in Glenheim addition some very substantial houses are being built. This adjoining Prospect just east and west of Prospect Avenue.

In certain instances the tendency in Kansas City is now for the best residences rather to recede from the publicity of the boulevard, however, along Ward Parkway and the other great boulevards through the Country Club District are some of the handsomest homes, and the property along Linwood Boulevard and Armour Boulevard is of much greater value than on the streets farther back. It is true, however, that along Ward Parkway and the other Country Club boulevards the residences have been very carefully restricted and the residences back from the boulevards a block or two are in many instances larger and more pretentious than those on the Parkway itself. The highest priced property in the Country Club District is along Ward Parkway.

The establishment of Ward Parkway has, of course, benefited all of the property out there. It is of benefit to it specially as different from the benefit to other property in other parts of the City.

In the same manner the Abernathy tracts received a special benefit from the establishment of The Paseo, a different benefit from what might have been gained by the residence of my brother, Mr. Elliot Jones, out northeast. All property in the immediate neighborhood of all of these boulevards improvements in Kansas City has in most instances been especially benefited by those improvements.

These plats of Park Gate addition which have been offered in evidence were submitted to the City Planning Commission. We had the City Engineer and our engineer go over the plats and they said that the grades of the streets running into Meyer Boulevard would not be prohibitive. That is the grades up Askew Avenue, and Bales [fol. 154] Avenue, would not be prohibitive. We would not approve the plat and the Board of Public Works would not have approved it unless provision had not been made for linking up the streets with Meyer Boulevard.

Mr. Palmer: Isn't it a fact that the building of boulevards and the laying out of boulevards in a new district especially in unplatted lands tends to fix the value of the property in the whole district and not just immediately adjoining the boulevard?

Witness:

A. That is rather hard to substantiate.

Mr. Palmer: Take Gladstone Boulevard, take Ward Parkway, hasn't it been the tendency of those boulevards to elevate the value of the land on both sides?

Witness: I think the whole boulevard system has certainly justified itself.

On Re-Direct Examination Mr. Jones testified as follows:

The lots in Park Gate addition which were platted and sold, sold from \$15.00 to \$20.00 a foot, or possibly some of it for less, where the property was below grade. The property on the side streets ranged from \$8.00 to \$10.00 to \$12.00 per foot. (This evidence admitted over defendant's objection). It is considered that there are about 250 front feet to the acre. \$10.00 a front foot is \$2,500.00 an acre; \$20.00 a front foot would be \$5,000.00 per acre.

There is an old pond about in the center of Tract 2. The tract is rather low and there has been considerable water there. Leading out from there towards the south are a number of more or less deep gullies. Quite a large portion of this tract is below the grade of 63rd [fol. 155] Street and much below the grade of the surrounding territory.

With reference to Tract 11 the northwest corner of it, just at the southeast corner of 63rd and Prospect, is low ground for quite a distance south and east. There is a deep ravine running from 63rd Street in a southwesterly direction to a corner of the property. It is below 63rd Street and a good deal below Prospect. All of the tract is vacant ground.

#### STIPULATION FOR SUBSTITUTION OF PARTIES:

It was thereupon agreed and stipulated by the consent of all parties that B. Haywood Hagerman might be substituted as Plaintiff in the place of Bert Steeper, Bert Steeper having conveyed the tract in question to B. Haywood Hagerman, and that the suit might be prosecuted in the name of B. Haywood Hagerman in the same manner and to the same extent as though it had been brought by him originally.

It is further admitted by the defendants that Mr. Riddle, President of the Evanston Park Realty Company, which was the owner of the property at the time of the institution of the grading proceedings, would, if present, testify that the company had no knowledge of said proceeding that is, no actual knowledge of said proceeding, and that the first it knew of it was when the company officials went to renew or extend the loan on the property. At that time they learned for the first time of this special assessment of \$12.511.60 against the property.

Thereupon the Plaintiffs rested.

And thereupon, to sustain the issues on their part the defendants offered the following oral and documentary evidence.

Defendants offered in evidence the petition filed in the Circuit Court of Jackson County, Missouri, in Cause No. 90628 in that Court. This petition was admitted in evidence over the objection of the plaintiffs as Defendants' Exhibit "C". Said Exhibit "C" is substantially as follows:

EVIDENCE: DEFENDANT'S EXHIBIT "C"

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY, JANUARY TERM, 1915

No. 90628

In the Matter of the Grading of Meyer Boulevard from the West Line of Swope Parkway to the East Line of the Paseo under Ordinance of Kansas City, Missouri, No. 21831, Approved January 26, 1915

Petition

Comes now Kansas City, Missouri, by A. F. Evans, City Counselor, and Jay M. Lee, Assistant City Counselor, and alleges that an ordinance of Kansas City, Missouri, No. 21831, was duly passed by the Common Council of said City, and was approved by the Mayor of said City on January 26, 1915, that said Ordinance No. 21831 is in words and figures as follows, to-wit:

[fol. 156] And a certified copy of said ordinance marked Exhibit "A" is filed herewith, attached hereto, and made a part hereof; that by said ordinance provision is made for the work specified in said ordinance to be done, and for the payment for same by special tax bills to be charged as a special tax on parcels of land (exclusive of improvements thereon) benefited thereby, (after deducting the portion of the whole cost, if any, which the city may pay) within the limits of the benefit district prescribed and determined by said ordinance; and the limits of said benefit district within which it is proposed to assess property for the payment for said work, are as hereinbefore defined and set forth as in Sections 4 and 6 of this ordinance.

Kansas City further states and alleges that plans and specifications for the work specified and provided for in said ordinance were duly approved and adopted by the Board of Public Works and by the Board of Park Commissioners as set forth in said ordinance; and that after the passage of said ordinance an approximate estimate of the cost of said work was made by the Board of Public Works, as provided by law, and duly made of record by said Board on the 9th day of February, 1915, by its Resolution under Entry No. 75143, which said approximate estimate was duly approved and adopted by the Board of Park Commissioners on the 9th day of February, 1915, by its Resolution No. 1855; and a copy of said

Resolutions showing said approximate estimate of the cost of said work, are filed herewith, attached hereto, and made a part hereof, marked Exhibits "B" and "C" respectively.

Kansas City also prays the court to find and determine the validity of said ordinance, and the question of whether or not the respective tracts of land within said benefit district shall be charge<sup>d</sup> [fol. 157] with the lien of said work in the manner provided by said ordinance; and that the Court make an order appointing a day and place for a hearing on the matters referred to in this petition, and also for an order of publication and service according to law.

Kansas City, By A. F. Evans, City Counselor. Jay M. Lee,  
Ass't City Counselor.

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[fol. 158] Along with said Petition, Defendants offered in evidence the Exhibits which were attached to and filed with the Petition in the Circuit Court proceeding, one of said exhibits being Ordinance of Kansas City, No. 21831, already introduced in evidence, the other being a Resolution of the Board of Public Works of Kansas City, No. 75143. This Resolution was admitted in evidence over the Plaintiffs' objection as Defendants' Exhibit "D." It is substantially as follows:

[fol. 159] EVIDENCE: DEFENDANTS' EXHIBIT "D"

Document No. 75143

February 9, 1915.

The Board of Public Works adopted the following Resolution:

In the matter of the grading of Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, under Ordinance of Kansas City, Missouri, Numbered 21831, approved January 26th, 1915.

Whereas, by ordinance of Kansas City, Missouri, Numbered 21831, approved January 26th, 1915, entitled, "An Ordinance to grade Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, and to condemn easements to support embankments or fills, describing the nature of the improvement, providing how the cost thereof shall be paid, and prescribing the limits within which private property is deemed benefited by the proposed improvement, and assessed and charged to pay damages caused by said grading, and by the condemnation of said easements, and assessed and charged to pay the cost of said improvement" provision was made for the grading of a portion of Meyer Boulevard and for payments of the cost of said work as set forth in said ordinance, and

Whereas, as required by law, an approximate estimate of the cost of the work provided for in said ordinance has been made by this Board, now therefore,

Be it resolved by the Board of Public Works of Kansas City, Missouri: That it does hereby adopt said approximate estimate of

the cost of said work, said approximate estimate, as completed, being as follows; to-wit:

[fol. 160]

Earth Embankment,	320,100 cu. yds.,	at .25.....	\$80,025.00
Rock Excavation,	4,800 " "	at .90.....	4,320.00
15" Drain Pipe,	290 Lin. ft.	at .65.....	188.50
12" " "	820	at .50.....	410.00
			<hr/>
			\$84,943.50

Ayes: Gallagher, Hays and Webster.

I, F. E. McCabe, Secretary of the Board of Public Works of Kansas City, Missouri, hereby certify that the annexed and foregoing is a true and correct copy of a resolution adopted by the Board of Public Works in the matter of the grading of Meyer Boulevard from the west line of Swope Parkway to the east line of the Paseo, under Ordinance of Kansas City, Missouri, No. 21831, approved January 26th, 1915, as the same appears of record and on file in the records of Official Proceedings of the Board of Public Works, Volume No. 31, at Page 144, in this office.

In testimony whereof, I have hereunto set my hand and affixed the official seal of the Board of Public Works on the 26th January 1921.

F. E. McCabe, Secretary Board of Public Works, Kansas City, Missouri.

[fol. 161] Defendants also offered in evidence a Resolution of the Board of Park Commissioners of Kansas City, No. 1855, which was admitted in evidence by the Court over Plaintiffs' objection as Defendants' Exhibit "E." Said Exhibit is substantially as follows:

[fol. 162] EVIDENCE: DEFENDANTS' EXHIBIT "E"

Tuesday, Feb. 9, 1915.

No. 1855. On motion of Mr. Lechtman seconded by President Craver the following resolution was adopted:

Be it resolved by the Board of Park Commissioners of Kansas City, Missouri:

That the approximate estimate of the grading of Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, as adopted by resolution of the Board of Public Works by Entry Number 75143, and as provided for under ordinance Number 21831, approved January 26, 1915, said estimate being in the total sum of \$84,943.50, be and the same is hereby adopted, approved and entered on record in this office the Board of Park Commissioners on the 9th day of February, 1915.

Ayes: Lechtman and Craver. Absent: Dr. Logan. 2 Ayes.

[fol. 163] Defendants thereupon offered in evidence a certified copy of the record entries in Cause No. 90628, in the Circuit Court of Jackson County, Missouri. Their admission was objected to on behalf of the Plaintiffs on the ground that they were not material to any issue in the case and for the additional reason that it appears on the fact of the Circuit Court proceedings that the case in the Circuit Court was not of the kind or character authorized under the Constitution or Laws of the State of Missouri.

Said record entries were admitted in evidence by the Court as Defendants' Exhibit "F". Said Exhibit is substantially as follows:

[fol. 164] EVIDENCE: DEFENDANTS' EXHIBIT "F"

Be it remembered that on the 33rd day of the regular January Term, 1915, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 17th day of February, 1915, the following proceedings were had and made of record before Hon. Thomas J. Seehorn, presiding Judge of Assignment Division, in the cause entitled

Assignment Division

No. 90628

In the Matter of the Grading of MEYER BOULEVARD from the West Line of Swope Parkway to the East Line of the Paseo under Ordinance of Kansas City, Missouri, No. 21831, Approved the 26th Day of January, 1915

Now comes Kansas City, Missouri, by its Assistant City Counselor, Jay M. Lee, and files with the Court a certified copy of the aforesaid ordinance; also a map or plat descriptive of said proceeding.

Thereupon, it is ordered by the Court that this proceeding be and now is assigned to Division numbered Nine (9) of this Court, for further hearing herein.

On the 33rd day of the January Term, 1915, the same being February 17th, 1915, the following further proceedings were had and made of record, to-wit:

33rd Day in Division 9

Wednesday, February 17th, 1915.

In the Matter of the Grading of Meyer Boulevard from the West Line of Swope Parkway to the East Line of the Paseo under Ordinance of Kansas City, Missouri, No. 21831, Approved January 26, 1915. Division 9. No. 90628

Now on this 17th day of February, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division No. 9. [fol. 165] comes Kansas City, Missouri, by A. F. Evans, City



Counselor, and Jay M. Lee, Assistant City Counselor, and files its petition alleging the passage and approval of its Ordinance No. 21831, approved January 26, 1915, and that plans and specifications for the work specified and provided for in said ordinance has been duly approved and adopted as set forth in said ordinance, and that after the passage of said ordinance an approximate estimate of the cost of said work was duly made by the Board of Public Works, as provided by law, and duly made of record by resolution, and approved and adopted by the Board of Park Commissioners by resolution, and that copies of said resolution, showing said approximate cost, and of said Ordinance, No. 21831, were filed with and made a part of said petition, and praying that the Court find and determine the validity of said ordinance, and the question of whether or not the respective tracts of land within the benefit district named in said ordinance shall be charged with the lien of said work in the manner provided by said ordinance and the Court thereupon makes the following order, to-wit:

To all persons whom it may concern, Greeting:

Whereas, Kansas City, Missouri, has filed in this Court its petition alleging the passage and approval of its ordinance No. 21831, approved January 26, 1915, and that plans and specifications for the work specified and provided for in said ordinance has been duly approved and adopted by the Board of Public Works and by the Board of Park Commissioners, as set forth in said ordinance, and that after the passage of said ordinance an approximate of the cost of said work was made by the Board of Public Works, as provided by law, and duly made of record by resolution, and said approximate estimate was duly approved and adopted by the Board of Park Commissioners by resolution; and

Whereas, a copy of said resolution, showing said approximate estimate of the cost of said work was filed with said petition and made [fol. 166] a part thereof; and

Whereas, Kansas City filed with said petition, and made a part thereof, a certified copy of said ordinance No. 21831, approved January 28, 1915; and

Whereas, by said ordinance provision is made for the work specified therein to be done, and for the payment for parcels of land (exclusive of the improvements thereon) benefited thereby, (after deducting the portion of the whole cost, if any, which the city may pay) within the limits of the benefit district prescribed and determined by said ordinance; and the limits within such it is proposed to assess property for the payment for said work are as hereinbefore defined and set forth, in Sections 4 and 8 of said ordinance; and

Whereas, by its said petition Kansas City prays the Court to find and determine the validity of said ordinance and the question of whether or not the respective tracts of land within said benefit district shall be charged with the lien of said work in the manner provided by said ordinance.

Now, therefore, all and each of you are hereby notified that the 29th day of March, 1915, is the day, and the courtroom of this



Division No. 9 of said Court, in the County Court House in Jackson County, Missouri, at Kansas City, is the place hereby fixed by said Court for a hearing on the matters set forth in said petition, and when and where evidence may be offered tending to prove the validity or invalidity or lack of legality of said ordinance, and of said proposed lien against the respective lots, tracts and parcels of land within said benefit district sought to be charged with such lien, and when and where the court will determine the question of whether or not the said lots, tracts and parcels of land owned by each defendant should be charged with such lien.

[fol. 167] And the Court further orders that this order be published in each issue of The Daily Record, the newspaper at the time doing the City printing for Kansas City, Missouri, for four (4) successive weeks, the last insertion to be not more than one (1) week prior to the day hereinbefore fixed for said hearing.

And the Court further orders that the parties owning or having an interest in the real estate fronting on that part of the aforesaid Meyer Boulevard proposed to be graded under these proceedings, be served within said city with a copy of this order, either by delivering to each of such owners or parties interested at any time before the day fixed herein for the hearing aforesaid, a copy of this order, or by leaving such copy at their usual place of abode with some member of their respective families over the age of fifteen (15) years, and in case of corporation, by delivering a copy to the president or secretary or some managing officer thereof, or to any agent of such corporation in charge of any office or place of business of such corporation, as by the Charter of said city provided.

On the 19th day of March Term, 1915, the same being March 29th, 1915, the following further proceedings were had and made of record in Cause No. 90628:

Now on this 29th day of March, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division numbered Nine (9), comes the said Kansas City by its City Counselor, and come all persons and parties concerned herein.

And come Percy Brown and Gertrude P. Brown as owners of property affected by this proceeding and file herein their entry of appearance and answer.

And the said Kansas City now files and submits to the Court proof of lawful publications and personal service of the orders of [fol. 168] the Court herein made on the 17th day of February, 1915, and the Court finds that same were made as the law requires and deems no further notice herein advisable.

Thereupon, this cause coming on for trial, it is submitted to the Court upon the proofs and the evidence, and is by the Court taken under advisement.

On the 7th day of the May Term, 1915, the same being May 17th, 1915, the following further proceedings were had and made of record in Cause No. 90628:

Now on this day comes Kansas City, by its Assistant City Counselor, Jay M. Lee, and comes defendant Gertrude P. Brown by her attorney, J. G. Paxton, and come all parties in this proceeding.

And the Court having heard evidence in the case, and the arguments of counsel, and being fully advised and informed in the premises, finds, orders and adjudges that in all respects Ordinance of Kansas City, Missouri, Number 21831, approved January 26, 1915, entitled:

"An Ordinance to grade Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, and to condemn easements to support embankments or fills, describing the nature of the improvements providing how the cost thereof shall be paid, and prescribing the limits within which private property is deemed benefited by the proposed improvement, and assessed and charged to pay damages caused by said grading, and by the condemnation of said easements, and assessed and charged to pay the cost of said improvements,"

is valid and legal, and that a contract for the doing of the work provided for in said ordinance may be entered into by Kansas City in conforming with said Ordinance and as provided by the Charter and [fol. 169] Ordinance of Kansas City; and that the proposed lien of the assessments for the payment of the cost of the work provided for in said ordinance under such contract against the respective lots, tracts and parcels of said land within said benefit district owned by the respective defendants in these proceedings, and each of them respectively, when assessed, apportioned and charged as provided in said ordinance and the Charter of Kansas City, is and shall be a valid and legal lien; and that said lots, tracts and parcels of land within said benefit district owned by said defendants may be charged with such lien respectively.

On the 9th day of the May Term, 1915, the same being May 19th, 1915, the following further proceedings were had and made of record in Cause No. 90628:

Comes Gertrude P. Brown, defendant herein, and files her motion to grant a new trial hereof.

On the 42nd day of the May Term, 1915, the same being June 28th, 1915, the following further proceedings were had and made of record in Cause No. 90628:

Now on this 28th day of June, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division numbered Nine (9), comes the said Kansas City by its City Counselor, and come all persons and parties concerned herein.

And the motion of Gertrude P. Brown for a new trial of this cause, is now by the Court taken up, heard, considered and overruled, to which ruling of the Court the said Gertrude P. Brown duly excepts and objects.

[fol. 170] It was thereupon agreed between the parties that the reduced blue-print which had been introduced in evidence as Plaintiffs' Exhibit 12 might be used instead of the original plat filed in the Circuit Court proceedings, and that said Exhibit 12 might stand as the plat introduced in that proceeding except as to the yellow marks placed on the reduced plat by Mr. Woodward. It was agreed that

Exhibit 12 was filed in the Circuit Court in said Cause No. 90628 with the exception of the yellow marks.

Defendants thereupon offered in evidence the plans and specifications referred to in Ordinance No. 21831. These plans and specifications were admitted in evidence over the objections of the Plaintiffs as Defendants' Exhibit "G". Said Exhibit is substantially as follows:

[fol. 171] EVIDENCE: DEFENDANTS' EXHIBIT "G"

Approximate Estimate

Earth embankment .....	320,100 Cubic yards.
Rock excavation .....	4,800 Cubic yards.
Solid Rock excavation .....	— Cubic yards.
Rubble Masonry (Portland Cement Mortar) .	— Cubic yards.
Riprap .....	— Cubic yards.
15" inch pipe .....	290 Lineal feet.
12" inch pipe .....	820 Lineal feet.

Board of Park Commissioners of Kanass City, Missouri

Resolution No. 6230

Contract for Grading Meyer Boulevard from the West Line of Swope Parkway to the East Line of the Paseo

This contract, made and entered into this 26th day of October, 1915, by and between McMillan Contracting Company as principal and party of the first part, and E. E. Tutt and Fidelity & Deposit Company of Maryland, as sureties, parties of the second part, and Kansas City, party of the third part,

Witnesseth: That whereas, the said party of the first part is the lowest and best bidder, for making the following city improvements, viz:

Grading Meyer Boulevard from the west line of Swope Parkway to the east line of The Paseo, to the full width and to the established grade of the same,

Now, therefore, the said party of the first part hereby agrees and binds himself, his heirs, executors, administrators and assigns, itself and its successors and assigns, to do and complete the work above mentioned in a substantial and workmanlike manner, within the time provided for in this contract, according to the plans and specifications for said improvement adopted, perfected and approved by the Board of Park Commissioners on the 11th day of December, 1914, by Resolution No. 1761, and on file in the office of said Board, which said plans and specifications are hereto attached and made a part of this contract, and to the satisfaction and acceptance of the Board of Park Commissioners of Kansas City. And the said party of the first part does hereby guarantee that the work herein men-

[fol. 172] tioned shall be completed without further compensation

than that provided for in this contract for the first cost of said work, and the acceptance of the work done hereunder and the issue of Special Tax Bills in payment therefor shall not be held to prevent the maintenance of an action on the Contractor's Bond for failure to complete the work in accordance with this contract and the plans and specifications for same.

In consideration of the completion by said party of all work embraced in this contract in conformity with the specifications hereto attached and stipulations herein contained, Kansas City, party of the third part, hereby agrees to pay to the said first party at the following rate, viz:

For each cubic yard of earth the sum of twenty-five and  $\frac{1}{2}$  cents (25½¢).

For each cubic yard of rock excavation the sum of eighty cents (80¢).

For each cubic yard of solid rock excavation, the sum of —.

For each lineal foot of fifteen (15) inch pipe, the sum of sixty-five cents (65¢).

For each lineal foot of twelve (12) inch pipe, the sum of fifty cents (50¢).

For each cubic yard of rip-rap, the sum of —.

For each cubic yard of Rubble Masonry, laid on Portland Cement Mortar, the sum of —.

In witness whereof, the said parties of the first and second parts have hereunto set their hands and seals respectively, and Kansas City executes this contract by its Board of Park Commissioners.

McMillan Contracting Co. (Seal), By D. E. McMillan, President. (Seal.) Fidelity & Deposit Company of Maryland (Seal), By James G. Guinotte, Attorney-in-fact. (Seal.) Attest: F. G. Tidmarch, Secretary. Kansas City, By Board of Park Commissioners of Kansas City, Mo., By Cusil Lechtman, President. Attest: T. C. Harrington, Secretary. (Seal.)

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City Comptroller's Office

Kansas City, Mo., Nov. 1, 1915.

The Sureties and Bond aforesaid are hereby approved as sufficient.  
M. A. Flynn, City Comptroller.

Office of Board of Park Commissioners

Kansas City, Mo., Nov. 2, 1915.

The foregoing Contract and Bond have this day been approved and affirmed by the Board of Park Commissioners, and the President and Secretary were ordered to execute the same on behalf of Kansas City, in the name of said Board of Park Commissioners.

[fol. 173] Witness my hand and seal of the said Board of Park Commissioners of Kansas City, Missouri, this 2nd day of November, 1915.

T. C. Harrington, Secretary.

City Clerk's Office

Kansas City, Mo., Dec. 9, 1915.

The foregoing Contract and Bond have been this day ratified, approved and confirmed by the Common Council of Kansas City by Ordinance No. 24693, approved Dec. 9, 1915.

Attest: J. A. Bermingham, City Clerk, By ———, Deputy.

Board of Park Commissioners of Kansas City, Missouri

Resolution No. 1761

Specifications for Grading Meyer Boulevard from the West Line of Swope Parkway to the East Line of the Paseo According to Plans on File in the Office of the Board of Park Commissioners of Kansas City, Missouri, as Above Specified, and to Its Full Width and to the Grade of Same.

**Excavation.**—Earth excavations shall be carried down on vertical lines, unless otherwise ordered by the Board of Park Commissioners. All material, however, which may slide or fall into the roadway from the sides of the excavation, prior to the final acceptance of the work, shall be removed and estimated as part of the material in the roadway proper.

**Embankments.**—Embankments shall be made of earth, or rock and earth. Where rock is used in the embankment, sufficient earth and fine material shall be used to thoroughly fill all interstices between the stones, but no rock will be permitted above a line two (2) feet below the finished surface of the lawn space, and twelve (12) inches below the finished surface of the roadway proper.

Embankments shall be carried up with a slope of one and one-half ( $1\frac{1}{2}$  foot horizontal to one (1) foot vertical, or with such rate of inclination as the Board of Park Commissioners shall deem necessary to maintain the embankment to its required height, width and shape; and when the estimate for work is made in embankment no [fol. 174] material shall be measured or paid for that lies outside of the line above specified.

Adopted and perfected this 11th day of December, 1914.

Board of Park Commissioners of Kansas City, Missouri. By  
C. C. Craver, President. Attest: T. C. Harrington, Secretary.

Adopted Dec. 11, 1914. Entry No. 73991.

Board of Public Works. B. L. Gregory, President. Attest:  
E. J. McDonnell, Secretary.

[fol. 175] Defendants thereupon offered in evidence the Resolution of the Board of Public Works No. 73991 which was admitted in evidence over plaintiffs' objection as Defendants' Exhibit "H." Said Resolution is in words and figures as follows:

[fol. 176] EVIDENCE: DEFENDANTS' EXHIBIT "H"

Document 73991

December 11, 1914.

The Board of Public Works now perfects, approves and adopts plans and specifications, being Documents numbered 73991, of the Board of Park Commissioners, providing for the grading of Meyer Boulevard, from the west line of Swope Parkway, to the east line of The Paseo, as provided by Resolution No. 1762.

Ayes: Gregory, Buckholz and Gallagher.

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[fol. 177] Defendants thereupon offered in evidence the proof of publication of the Order of Publication in Cause No. 90628 in the Circuit Court, which was admitted in evidence over Plaintiffs' objection as Defendants' Exhibit "I." Said Exhibit is substantially as follows:

[fol. 178] EVIDENCE: DEFENDANTS' EXHIBIT "I"

Order of Publication

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY, DIVISION NO. 9, JANUARY TERM, 1915

No. 90628

In the Matter of the Grading of MEYER BOULEVARD from the West Line of Swope Parkway to the East Line of the Paseo under Ordinance of Kansas City, Missouri, No. 21831, Approved January 26, 1915

Order

Now, on this 17th day of February, 1915, in this the Circuit Court of Jackson County, Missouri, at Kansas City, in Division No. 9, comes Kansas City, Missouri, by A. F. Evans, City Counselor, and Jay M. Lee, Assistant City Counselor, and files its petition alleging the passage and approval of its Ordinance No. 21831, approved January 26, 1915, and that plans and specifications for the work specified and provided for in said Ordinance had been duly approved and adopted as set forth in said Ordinance, and that after the passage of said Ordinance an approximate estimate of the cost of said work was duly made by the Board of Public Works, as provided by law, and duly made of record by resolution, and approved and adopted by the

Board of Park Commissioners by resolution, and that copies of said resolution, showing said approximate cost, and of said Ordinance No. [fol. 179] 21831, were filed with and made a part of said petition, and praying that the Court find and determine the validity of said ordinance, and the question of whether or not the respective tracts of land within the benefit district named in said ordinance shall be charged with the lien of said work in the manner provided by said ordinance and the court thereupon makes the following order, to-wit:

To all persons whom it may concern, Greeting:

Whereas, Kansas City, Missouri, has filed in this Court its petition alleging the passage and approval of its Ordinance No. 21831, approved January 26, 1915, and that plans and specifications for the work specified and provided for in said ordinance had been duly approved and adopted by the Board of Public Works and by the Board of Park Commissioners as set forth in said Ordinance, and that after the passage of said Ordinance an approximate estimate of the cost of said work was made by the Board of Public Works, as provided by law, and duly made of record by resolution, and said approximate estimate was duly approved and adopted by the Board of Park Commissioners by resolution; and

Whereas, a copy of said resolution, showing said approximate estimate of the cost of said work were filed with said petition and made a part thereof; and

Whereas, Kansas City filed with said petition, and made a part thereof, a certified copy of said Ordinance No. 21831, approved January 26, 1915, which said Ordinance is in words and figures as follows, to-wit:

(Here follows ordinance No. 21831.)

[fol. 180] And,

Whereas, by said ordinance provision is made for the work specified therein to be done, and for the payment for same by special tax bills to be charged as a special tax on parcels of land (exclusive of the improvements thereon) benefited thereby, (after deducting the portion of the whole cost, if any, which the city may pay) within the limits of the benefit district prescribed and determined by said ordinance; and the limits within which it is proposed to assess property for the payment for said work are as hereinbefore defined and set forth, in Section- 4 and 6 of said Ordinance; and

Whereas, by its said petition Kansas City prays the Court to find and determine the validity of said ordinance, and the question of whether or not the respective tracts of land within said benefit district shall be charged with the lien of said work in the manner provided by said ordinance.

Now, therefore, all and each of you are hereby notified that the 29th day of March, 1915, is the day, and the Court room of this Division No. 9 of said Court, in the County Court House in Jackson County, Missouri, at Kansas City, is the place hereby fixed by said Court for a hearing on the matters set forth in said petition, and



when and where evidence may be offered tending to prove the validity or invalidity or lack of legality of said ordinance, and of said proposed lien against the respective lots, tracts and parcels of land within said benefit district sought to be charged with such lien, and when and where the Court will determine the question of whether or not the said lots, tracts and parcels of land owned by each defendant should be charged with such lien.

And the Court further orders that this order be published in each issue of The Daily Record (the newspaper at the time doing the city printing for Kansas City, Missouri,) for four (4) successive weeks, the last insertion to be not more than one (1) week prior to the day hereinbefore fixed for said hearing.

[fol. 181] And the Court further orders that the parties owning or having an interest in the real estate fronting on that part of the aforesaid Meyer Boulevard proposed to be graded under these proceedings, be served within said City with a copy of this order, either by delivering to each of such owners or parties interested at any time before the day fixed herein for the hearing aforesaid, a copy of this order, or by leaving such copy at their usual place of abode with some member of their respective families over the age of fifteen (15) years, and in case of corporation, by delivering a copy to the President or Secretary or some managing officer thereof, or to any agent of such corporation in charge of any office or place of business of such corporation, as by the Charter of said City provided.

A true copy of the original order.

Witness my hand and seal of said Court this 17th day of February, 1915.

James B. Shoemaker, Clerk of the Circuit Court of Jackson County, Missouri, By E. L. Swope, Deputy. (Seal.)

(Personal)

I hereby certify that I executed and served the within order and notice in Kansas City, Missouri, by delivering a copy thereof personally to each of the following owners and parties in interest within named.

On 1st day of March, 1915, to F. B. Heath, Jas. C. Leiter, Geo. A. Leiter, Gustav V. Bachman, Richard W. Hoeker.

(Service of Chief Officer of Corporation)

I hereby certify that I executed and served the within notice in Kansas City, Missouri, on Evanston Golf Club (Lessee) by delivering a copy of said notice and order to I. H. Hettinger, he being the President and chief officer of said corporation, this 1st day of March, [fol. 182] 1915.

(Cannot be Found)

I further certify that service cannot be made of the within notice in Kansas City, Jackson County, Missouri, upon the following property owners and parties within named, either by delivering a copy



of such notice personally to such property owners and parties, or by leaving a copy at the usual place of abode of such property owners and parties with a member of their respective families over the age of fifteen years: Nannie R. Harper, Rachel Z. Furnish, Elizabeth H. Furnish, Thos. E. Swope, Jr.

Witness my hand this 4th day of March, 1915.

Wm. E. Kehoe, Police Officer, Kansas City, Mo.

### Affidavit of Publication

STATE OF MISSOURI,

County of Jackson, ss:

Elbert E. Smith, of Kansas City, Missouri, of lawful age, being duly sworn, says that he is one of the publishers of The Daily Record, a newspaper published daily, except Sundays, in Kansas City, Jackson County, Missouri, and that the notice to property owners, a true copy of which is hereto attached, was duly published in the daily edition of said newspaper for twenty-nine (29) days, beginning February 24, 1915, and in each of the issues thereafter, to and including March 29, 1915.

Elbert E. Smith.

Subscribed and sworn to before me this 29th day of March, 1915, and I certify that I am duly qualified as a Notary Public and that my term expires the 24th day of February, 1917. Harold A. Smith, Notary Public in and for Jackson County, Missouri.

Filed March 29, 1915. James B. Shoemaker, Clerk. E. T. Swope.

(Attached to said Affidavit of Publication is a printed order of publication, the same as the Order of Publication appearing in this Exhibit.)

[fol. 183] Defendants thereupon offered in evidence the Answer filed by Gertrude P. Brown in Suit No. 90628 in the Circuit Court, which was admitted in evidence over Plaintiffs' objections as Defendants' Exhibit "J." Said Exhibit is substantially as follows:

[fol. 184] EVIDENCE: DEFENDANTS' EXHIBIT "J"

In the Circuit Court of Jackson County, Missouri, at Kansas City,  
March Term, 1915

No. 90628 .

In the Matter of the Grading of MEYER BOULEVARD

Now come Percy Brown and Gertrude P. Brown and enter their appearance herein and state that they are the owners of the North half of the Northwest quarter of the Southeast quarter of Section

Three (3), Township Forty-eight (48) and Range Thirty-three (33) in Jackson County, Missouri, except a tract of one acre in the Northeast corner thereof, and that said real estate is contained in the benefit district which is sought to be taxed for the grading of said Meyer Boulevard.

Said parties state that they are the defendants herein and the owners of said property, and that said property does not abut on Meyer Boulevard; that the South line thereof is a quarter of a mile from said boulevard, and the north line thereof is a half mile from said Meyer Boulevard. Said defendants state that their property is not directly benefited by the opening of said boulevard, and is only remotely benefited, as all the other property in Kansas City is. That the property of defendants, above described, lies on one boulevard, to wit: Swope Parkway, upon which is operated a street car line, and it can derive no particular and special benefit from the grading of said Meyer Boulevard. That the grading of said boulevard will greatly enhance the value of the property abutting on said boulevard, and yet, in the apportionment of the cost of said grading, the property of said defendants, fronting on said Swope Parkway, may be assessed at as great a sum as the property on said Meyer Boulevard, and the effect would be that the special tax levied thereunder against the property of defendants may equal, acre for acre, the special tax assessed against the property immediately benefited, to wit: the property abutting on said Meyer Boulevard.

Defendants further state, that for the reasons, aforesaid, it would be illegal and improper for the court to declare this ordinance valid, and it would also be illegal for the reason that on its face thereof, the charter provision authorizing this proceeding is void, for the reason that it violates the Constitution of Missouri, and the Constitution of the United States. It would be just as legal to provide that because the paving of said Meyer Boulevard was of an unusual width, and the cost of the paving thereof excessive, that the land within half a mile of said boulevard should pay in proportion to its value for the paving of same.

Defendants aver that it is proposed to assess the general benefits for the opening of said boulevard against the property of said defendants, and other property owners in said district, when the same should be assessed against the city at large; all the citizens of which participate in the benefits thereof.

John G. Paxton, Attorney for Defendants Percy and Gertrude P. Brown.

[fol. 186] Defendants thereupon offered in evidence the motion for a New Trial filed by Gertrude P. Brown in said Cause No. 90628 which was admitted in evidence by the Court over Plaintiffs' objections as Defendants' Exhibit "K." Said Exhibit is, omitting the caption, as follows:

[fol. 187] EVIDENCE: DEFENDANTS' EXHIBIT "K"

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY, MAY TERM, 1915

No. 90628

In the Matter of Grading of MEYER BOULEVARD from the West Line of Swope Parkway to the East Line of the Paseo, under Ordinance of Kansas City, Missouri, Numbered 21831, Approved Jan'y. 26, 1915

Motion for New Trial

Now comes the defendant, Gertrude P. Brown, and moves the Court to grant her a new trial herein, for the following reasons, to-wit:

1. The judgment rendered in said cause is against the law.
2. The judgment in said cause is against the evidence.

John G. Paxton, Attorney for said Defendant, Gertrude P. Brown.

[fol. 188] W. H. DUNN, being duly sworn and examined on the part of defendants, testified as follows:

I have lived in Kansas City 30 years and am now superintendent of Parks, Park Department. With the exception of one time when I was out about a couple of years I have been connected with the Park Department 22 years. I am familiar with the proceedings leading up to the improvement of Meyer Boulevard. That was in connection with the work of the Park Board. I was familiar with the establishment of the benefit district for the improvement. Plaintiffs' Exhibit 12 is a plat of the benefit district and is a copy of the original plat prepared under Ordinance No. 21831.

I have been familiar with practically all of the park and boulevard proceedings in Kansas City, having been connected with the Park Board during almost all of its existence.

Mr. Bowersock:

Q. I will ask you to state, Mr. Dunn, from your experience with the Park Board, your own opinion as to the considerations warranting, if they did warrant, the establishment of this benefit district.

Mr. Langworthy: I object to that question because this witness is not qualified as an expert, and it really calls for secondary evidence, the consideration which moved the Park Board.

Over said objection the witness was permitted to answer, as follows:

Witness: I should consider the benefit district for the improvement very reasonable and right, that is, from the experience I have had in all of those condemnations and grading and benefit districts other than this. The district is reasonable because this section of the boulevard is through acreage, unplatted property. It is limited on the south [fol. 189] by ground that had been laid out in streets and small ownerships. To a great extent the same is true of the property north of the benefit district. The property in the benefit district being acreage property could more feasibly be made to conform to the improvement of Meyer Boulevard than if the property were in small sub-divisions and ownerships, where adjustments would have to be made to conform to the streets and grades. Furthermore, as a general proposition, it is a benefit to the property included in the benefit district, as is true with all our park improvements. It seems like a reasonable benefit district.

The ground on each side of Meyer Boulevard is unplatted as to streets and lots. It was unplatted as far south as 67th Street and as far north as 63rd Street. 63rd Street was at the time an open and improved thoroughfare. 67th Street was open but not paved, it was partially graded. The grading of a boulevard is customarily a benefit to the property adjacent to it, and to the property on adjacent streets which are connected with the boulevard. It is a benefit to the entire territory.

Some of the property next to Meyer Boulevard is above the boulevard; some of it is a little below; some of it is on grade. The portion that is above grade is greater than the portion below grade. All of Tract 6 and most of Tract 10 is considerably below the grade of the Boulevard. It has been suggested here that this Boulevard is of unusual width. As to how it compares in width with the other boulevards of the City the following figures will show: The Paseo for its whole length of the City is fully 225 feet wide and wider than that in places. Through the north end of the City from 9th Street to 18th Street the original condemnation was 225 feet wide. Going south [fol. 190] from there, after crossing the Terminal tracks it broadens out to from 300 to 400 feet wide. This is from about 20th Street to 25th Street. Then again from 47th Street to the south City limits it is generally 225 feet wide, except in certain locations where it is a great deal wider. At the intersection of Meyer Boulevard and about Brooklyn or Woodland the Paseo is 700 to 800 feet wide. Ward Parkway varies in width from a few hundred to 700 or 800 feet in width. The formal part of Ward Parkway south of 55th Street is 225 feet wide. That is somewhat similar to this Meyer Boulevard improvement. Gillham Road is of variable width, wider in places than Ward Parkway, but all of variable width. The Paseo from 57th Street to 67th Street is 350 feet wide. So 220 feet is not an unusual width for boulevards in Kansas City.

On cross-examination Mr. Dunn testified as follows:

The difference between a parkway and a boulevard may be stated thus: a parkway may include more platted and irregular land than

a formal boulevard. Otherwise they are both thoroughfares as we construe them, as is also an alley. We would call this particular thoroughfare (Meyer Boulevard) a boulevard.

I think Mr. Kesler's article in the 1914 Report of the Board of Park Commissioners correctly states the situation. That article speaking of Meyer Boulevard says: "This great east and west reach receives practically all of the north and south lines of boulevards and parkways. Every one of these lines of parks and boulevards throughout the entire system are really merely connections between Swope Park on the southeast and the business district of the City on the northwest."

Swope Park at the time it was given to the City was wholly outside [fol. 191] of the City. Later on there was an approach to it called Swope Parkway. The street car system came out to the Park on that line. The only cross-town street that was accessible for the general population was 63rd Street at the time Swope Park was acquired. Since Meyer Boulevard has been graded 63rd Street has become practically disused. I think this is in great part on account of the pavement on 63rd Street. However, very much traffic would naturally go onto Meyer Boulevard in any case. 65th Street will also be a less important street.

Q. It was argued as desirable, as substantially stated here, was it not, Mr. Dunn, that there should be a connection from all the boulevards north and west to Swope Park and this Meyer Boulevard was selected for that connection, wasn't it?

A. Well, Swope Park was considered worthy of the best lines of approach we could give it.

Q. Yes; so you made this the most worthy thing you could work out, didn't you?

A. Tried to.

Certainly one object in constructing the Boulevard was to enable the people of the west part of Kansas City and the north part of Kansas City to reach Swope Parkway. I don't think, however, that this was the principal object. In a sense the Boulevard was intended for the benefit of the other parks and boulevards in Kansas City, and the population of Kansas City north of the Boulevard; however, a boulevard like this could not be put through that class of undivided property without putting it on the market and improving it, giving benefit to it. What Mr. Kessler says as to Meyer Boulevard being really a mere connection between Swope Park and the business district is true of the whole park system. Of course, Meyer Boulevard in connection with the Paseo constitutes an important artery in that system. It was for this reason that the benefit district was enlarged beyond the district which is ordinarily assessed with the cost of grading or improving a boulevard.

The whole improvement of Meyer Boulevard and the Paseo from 47th Street to the south city limits and Brookside Boulevard from [fol. 192] Broadway or Wornall Road to Meyer Boulevard and to Swope Park were taken in one condemnation proceeding and a corresponding benefit district was made to pay for it. This benefit dis-

trict did not comprise two whole park districts but was a special district. It covered generally the property from Broadway to Prospect.

Meyer Boulevard is, of course, a great improvement, an improvement of great general utility, but it is not for the benefit merely of the people who live on the north side of the boulevard, but for the benefit of boulevards that lead to that boulevard from other sections of the City. More especially it was distinctly a benefit to property included in the district in which it was condemned.

Something has been said about the width of the various boulevards in Kansas City the Paseo among them. It is true of the original Paseo from 9th to 18th Streets that parks and sunken gardens and play grounds and other similar improvements of a park nature were constructed in between the driveways. It is also true that toward the southern part of the Paseo partly opposite the Blue Hills Club just north of 63rd Street that there is a wide parkway in between the driveways on the Paseo not yet improved. This parkway is very similar to the parkway between the driveways on Meyer Boulevard. The same is also true on Ward Parkway beyond 53rd Street. It wasn't necessary, of course, in order that the people living in the neighborhood of Meyer Boulevard should have an outlet for their property that these parkways should be provided for between the driveways. That was a part of the general parkway and boulevard system. The boulevards of the City widen out into parkways and narrow into boulevards and driveways throughout the entire City. It is generally true that property abutting on a boulevard receives more special benefits from the building of the boulevard than property a distance away from it. I should say that that is true in this instance.

[fol. 193] CHARLES C. CRAVER, being duly sworn and examined on behalf of defendants, testified as follows:

I was a member of the Board of Park Commissioners of Kansas City at the time the proceedings for Meyer Boulevard were put through. Colonel Lechtman and Dr. Logan were the other members of the Board. I believe that Judge Shannon Douglas was on it the last year. I was on the board which approved this plan for grading Meyer Boulevard. This plat (Plaintiffs' Exhibit 12) is a blue print reduced of the original plat prepared under Ordinance 21831 governing the work.

Mr. Bowersock:

Q. What consideration, if any, did the Board give to the establishment of the boundaries of the benefit district shown on the plat?

Mr. Langworthy: I object to that question as immaterial. I assume the judgment there would be the judgment he would state but it seems to me the official acts speak for themselves.

The Court: I think it is perfectly competent for him to state what his notions were. I think that is probably as far as he should go.

I don't believe his description of what entered into his official acts is hardly competent. I think he may state what he thinks of that and why.

Mr. Bowersock: If Your Honor please, it seems to me it has this bearing. It is charged that this action is arbitrary and unreasonable. Now if it was the result of consideration by the Park Board of all of the considerations out there going over a considerable period of time and the exercise of judgment on their part rather than an arbitrary act that it seems to me should be competent, that they considered the various elements entering into the situation and reached a result which they thought reasonable.

The Court: Well, I will let that in, subject to the objection.

[fol. 194] The Witness:

A. The first thing in a matter of this sort, of course, is the consideration of the reasonableness of placing a burden of this sort on the abutting property. In this instance so much of the property was below grade and affected so adversely by the grade that we thought best to establish a benefit district. Our judgment was largely influenced by the measure of benefit that the adjacent property would receive and how far that benefit would extend. Of course there is a general benefit spread over the entire City for any improvement of this sort. Furthermore, establishing a benefit district is largely a matter of compromise. In this instance 63rd Street was considered a reasonable northern boundary for the reason that traffic originating at 63rd Street on the north would naturally flow toward the north and 63rd Street being a street that was travelled and opened at that time was considered a reasonable boundary for the benefit of the district. On the south 67th Street was in contemplation then of being made a trafficway with a street car upon it. That has not occurred as yet, but 67th Street was open at the time though not fully improved.

South of 67th Street we found the property platted into small lots. The property was sold on the installment plan and small indifferent houses constructed there inhabited by a poorer class of people. From the nature of the country south of 67th Street that property could not be so improved as to get the full benefit of a boulevard like this and we thought, therefore, that it was manifestly unfair to extend the district beyond 67th Street, so a compromise was finally reached and a benefit district established such as you find here according to the best of our judgment as to how the property was affected.

The judgment of the Board at that time is still my judgment.  
[fol. 195] Q The property north of Sixty-third Street is platted for the most part?

A. Yes sir, it is platted, not in small lots though, they are larger lots.

Q. And that south of Sixty-seventh Street is platted in very small lots?

A. Yes sir; and sold on the installment plan, small homes.



The Court:

Q. And do I understand you think that is a class of property that would not be benefited by the boulevard?

A. There is a general benefit, certainly, extending.

The Court:

Q. Oh, I understand, but I am speaking about special benefits?

A. Oh, we didn't think a sufficient specific benefit to justify the extension of the benefit district beyond Sixty-seventh Street.

Q. Yes; I was trying to get at the reasons there why you thought that distance south of the boulevard, that the extension, special benefit south of the boulevard was less than north of the boulevard. You see you have taken off only about one-half as much on the south as that north and I don't understand your reason for thinking that special benefit didn't extend farther south than Sixty-seventh Street?

A. That property had been divided into small lots, sold to small home owners, sold largely on the installment plan, the class of property that would not benefit to the extent of property that was more subject to a higher class of improvement, for instance.

It would be impracticable for the people living south of 67th Street to go direct to Meyer Boulevard because of the grade leading up to Meyer Boulevard from the south. That property is very much below grade, some of it I think as much as 15 or 18 feet. Furthermore the property south of 67th Street is a class of property which is served more by street cars than by boulevards, and the [fol. 196] street cars of course on Swope Parkway and on Prospect.

I am in the real estate business and have been for about 20 years. In my opinion the grading of a boulevard of this kind through open, unimproved property affects the property very favorably in value. That benefit is not confined to the property immediately abutting on the boulevard but extends back to a considerable distance on each side, the distance back depending upon the circumstances of the particular case. In my opinion the property both to the north and to the south of the boulevard to the limits of the benefit district itself increased in value by the grading proceedings, especially the property on the north side of the boulevard, which is above grade and a better class of property. The benefit from this improvement is greater upon unimproved property of the character of that within the benefit district than it would be upon property already subdivided into lots and blocks because unimproved property lends itself more to a proper adjustment to the improvement.

On cross examination Mr. Craver testified as follows:

The greater portion of the traffic over this boulevard of course originates from the City at large. That is true of all the boulevards. Travel from all of the boulevards drains into this boulevard and Swope Parkway and from there into the park. Since the open-



ing of Meyer Boulevard it is used very much more for travel into Swope Park than Swope Parkway but this is partially due to the fact that the north part of the Parkway is in bad condition. When the bridge is put across Brush Creek, Swope Parkway will probably be as much and more used perhaps than Meyer Boulevard.

Q. The long and short of it is, Mr. Craver, that, this broad [fol. 197] entrance to Swope Park with parkways in between was planned so as to make an appropriate entrance to this great public park? That is what the Park Board had in mind, wasn't it?

A. That is true.

Q. And so it was this boulevard was graded on practically a level plane all the way from Brooklyn clear up to Swope Park, so as to make the effect of this great entrance just a broad level plane approaching this great park? Isn't that true?

A. That is the policy of all the boulevards, to make them as much on a plane as possible to avoid collisions.

Q. But it was made so especially because of this entrance to this great park? Isn't that true?

A. Not any more so than the building of boulevards in other parts of the city.

Q. So that, as a matter of fact, the public at large received the very large and substantial benefit from this opening and widening of this boulevard, isn't that true?

A. The public at large receives much benefit from all the boulevards established in Kansas City; that is true there.

Q. Confined to this particular boulevard there?

A. And as to this particular one, you have got to take the whole system of it to get that public benefit.

Q. But it is particularly true of this particular boulevard, because this boulevard, more than any other one boulevard in the city, leads into a common meeting ground for all of the people in the city?

A. This and Swope Parkway together, yes sir.

Q. All right; so it is particularly true of this boulevard, and Swope Parkway, the public at large received substantially the entire benefit, or a very large portion of the benefit, received from the opening and grading of this boulevard? Isn't that true?

[fol. 198] A. More so than any other.

Q. More so than any other boulevard?

A. I think so. Now, of course—

Q. (Interrupting.) Then it is true, as I stated, isn't it, that the public at large receives the very substantial benefit from the opening and grading of this boulevard as providing means of access to this great park now? That is true, is it not?

A. That is true.

Q. Now you said a moment ago that abutting property is affected favorably by the opening of a boulevard and that is more particularly true of the property abutting immediately on a boulevard, is it not?

A. The favorable effect of property abutting immediately on the boulevard is overcome to quite an extent, and sometimes entirely

so, by the added cost of the street improvements for paving, sidewalks, and,—and so on.

Q. You know, as a matter of fact, matter of common knowledge that throughout the city property that abuts on the boulevard sells for more money than property on side streets? That is true, is it not, generally speaking?

A. Yes sir, generally speaking.

Q. So that the grading on this boulevard was of more benefit to the property abutting upon the boulevard than property that might have been two or three, four blocks away?

A. That property which was below grade, as some of this is, I would say absolutely not, could not be as much as the property that lies nice—

Q. (Interrupting.) I am talking about property generally. Now if you want to refer to specific property you may do so, but I am talking generally about property along the boulevard?

A. Yes sir.

[fol. 199] Q. You would say property abutting the boulevard was more greatly benefited than property away from the boulevard?

A. Yes, sir.

Q. And you could apply that to all property, whether above or below grade, that it was more benefited according to its value.

A. No, no, because I know property next to boulevards in Kansas City that were practically confiscated; they were of very doubtful if—very doubtful value indeed, property that is much below grade.

Q. I think perhaps you don't understand what I mean. Property that is abutting on the boulevard, we will say worth a thousand dollars, is benefited more by the grading of the boulevard than property that may be two or three, four blocks away; isn't that true, although worth a thousand dollars?

A. I want to make myself very plain on that. This property that is five, ten, fifteen feet below grade is almost worthless.

Q. All right; let us talk about—

A. (Interrupting.) Now the nice lying property, property that lends itself for residence purposes, nice residence purposes, of course, is benefited more.

Q. Let us not talk about that property, because as a matter of fact there are only two or three places along the whole boulevard, the entire length of this boulevard—mile in length—only two or three places where the property is left substantially below grade, isn't there?

A. No, I don't think so.

Q. Close to Park and about Garfield Place is about all there is—I was over there this morning—isn't that true?

A. No, not in my judgment.

Q. Well, a very large portion of this property along the boulevard, very large proportion of it, is either substantially on grade, or slightly [fol. 200] above grade, proper distance above grade to make it available for building purposes; isn't that true?

A. Yes sir, most of it is; but not the very large proportion.

Q. Well, leave it that way. I understand your testimony to be that most of it is?

A. Yes sir.

Q. Now then, as to that which is in that situation, I understand it to be your opinion that that receives a greater benefit proportionately by reason of the opening of the boulevard and grading of it than property which is situated away from the boulevard? That is true, is it not?

A. That is true.

Q. And it is true that the farther you get away from the boulevard the less the benefit is, special benefit?

A. Yes.

Q. Now do you know how far south of Meyer Boulevard the benefit district extended which provided for assessment of damages for the taking of land for Meyer Boulevard?

A. I took in the entire district.

Q. In other words, it went clear south to Seventy-fifth Street, did it not?

A. Yes, I believe it did.

Q. And went clear south to Seventy-fifth Street on the theory that all of the property clear south to Seventy-fifth Street was benefited by the taking of land for this boulevard?

A. Yes sir.

Q. Now if that property was benefited by the taking of lands for the opening up of this boulevard, why was it not likewise benefited by the grading of this boulevard so it could be opened up and used?

A. On the theory that the establishment of an improvement like [fol. 201] this in a district is—the mere establishment of an improvement like this in that district, is of distinct benefit to the whole district. Now when you come down to the physical end of it, use of it, daily use, and all that sort of thing, it confines itself to a lesser district and you would have overlapping and all that sort of thing in spreading the benefit assessments for different boulevards over different districts that would be very confusing.

Q. It stands to reason, of course, it would do no good to open up or take the land for this boulevard unless you opened it up and graded it so it could be used?

A. Certainly.

Q. If the land was taken and never opened up or used, of course, it would be of no benefit to anyone?

A. No.

Q. And if these people clear down to Seventy-fifth Street had paid for the acquiring of the land for that boulevard then it was to their interest and to their special benefit that that should be graded so they could use it?

A. Well, there is a general benefit that attaches to all improvements of this sort in a district, for which they pay a penalty. That is what it is.

Q. It is undoubtedly true that people south of Meyer Boulevard in going from their homes to town, unless they go on the street car,

would naturally go over Meyer Boulevard and from there over to the Paseo and from there down town?

A. Oh yes.

Q. That would be the natural way for them to go?

A. Absolutely.

Q. And the natural way for people living north of Meyer Boulevard would be to go down either over the Paseo or Sixty-third or Ward Parkway and go to town in that way? That is true, isn't it? [fol. 202] A. Not exactly, no. A man in an automobile don't regard distance, you know, and he seeks the best way to go, the best road, the best street, regardless of two or three or four blocks—

Q. (Interrupting.) You don't drive—

Mr. Bowersock: Let him answer.

A. (Continuing:) Regardless of two or three, four blocks in riding, so that has got to be taken into consideration.

Q. You don't drive a quarter of a mile out of the way to go down town, do you, if you have got a direct way?

A. Owing to the condition of the streets. If the streets are bad, what is a quarter of a mile? Nothing.

Q. Well, take for instance on Sixty-third Street, fronting on the north, practically a quarter of a mile from Sixty-third south to Meyer Boulevard. On the other hand there is Sixty-Third Street leading into the Paseo and Prospect leading down to Swope Parkway and also Ward Parkway, all of which lead down town; now you don't mean to be understood as saying people generally would take their cars and drive a quarter of a mile south and then a quarter of a mile back north again, being practically half a mile out of their way, you don't mean to say people would do that just for the pleasure of driving over Meyer Boulevard? You don't mean that?

A. For pleasure driving they seek the most favorable way to go.

Q. I am talking about going for business purposes, for pleasure might drive over the whole boulevard system. You don't mean to say they would drive quarter of a mile out of their way to get down town?

A. Oh no.

Q. Now you know, as a matter of fact, this property you speak of as being below grade has been platted, do you not?

A. I do, yes sir.

[fol. 203] Q. And streets have been laid out?

A. Yes sir.

Q. And, as a matter of fact, the distance that property is below grade extends only a short distance south, so when that property is graded up it will all be practically on the boulevard?

A. The few feet of it that is so much below grade perhaps is not worth the street improvements it will cost to put it in now.

Q. That part of it that is so situated is comparatively insignificant as compared to the entire amount of property along that boulevard, is it not?

A. With reference to that that is on grade, above grade?

Q. Yes?

A. There is more of it on grade and above grade.

Q. It is comparatively insignificant?

A. No, it is not insignificant, because—

Q. (Interrupting.) Well, it has all been platted and lots have all been sold?

A. Oh, you can sell lots ten dollars down and dollar a week—that is the way that property was sold—yes, anyone can.

The Court:

Q. Mr. Craver, one thing I would like to get clear on: You say it is a benefit, you say it is an improvement, a large improvement to this district benefited, now that is true if it becomes an improvement?

A. Oh yes.

Q. A finished product?

A. Yes sir.

Q. If you were to just simply take some waste land and never do any more with it, it would never be of any great value to that district?

A. Oh no.

Q. Then how can you make the distinction or differentiation between the different steps in doing so from the start until it ripens into a completed improvement? Isn't it of the same benefit and doesn't [fol. 204] that necessarily inure as a benefit that comes from the establishment of an improvement of that kind in a district?

A. Yes, Judge, I think that enters into the proposition, but this tax is not put on that property but onto the abutting property.

Q. I know about that feature. I am talking about the benefit, I am talking about the benefit to the district?

A. Why any improvement of this character is certainly a benefit to an extended degree for which they should pay, especially when the cost becomes so heavy upon the abutting property.

Q. That is true, but what I am getting at is, why isn't that also correspondingly true as in the original acquisition where the benefits extended further on out?

A. Simply because got to draw the line somewheres and we drew it there.

Q. In other words, you drew it for arbitrary, for convenience?

A. No; a matter of compromise. I will give you an illustration.

Q. That is the same thing?

A. I will give you an illustration: We established the benefit district for the Paseo from Forty-sixth Street south, which was an expensive improvement, very expensive, and we were two years I will say in getting all the divergent interests together and compromising on the benefit district between Prospect and Troost. We finally did so and I believe it has always been an improvement.

Q. When you speak of compromise, whom did you compromise with?

A. The fellows interested who appeared before the Park Board.

Q. They come in and present their claims and you hear them?

A. Yes sir.

Q. And you go over the matter and then reconcile your own divergent ideas as the board?

A. Yes sir; yes, use our best judgment.

[fol. 205] On re-direct examination Mr. Craver testified as follows:

The entire matter of fixing the limits of the benefit district is more or less a question of degree.

What has been said with regard to the public using Meyer Boulevard can be made to apply in the same manner to all of the boulevards in the City.

Furthermore, public, as here used, means the public as individuals, and not the public as landlords. The question of benefits and damages in proceedings of this kind refers to property owners and not to citizens in general.

CUSIL LECHTMAN, being duly sworn and examined on behalf of defendants testified as follows:

I have lived in Kansas City since 1887 and I was a member of the Park Board of Kansas City when the benefit district for the grading of Meyer Boulevard was established. In my opinion that benefit district was a reasonable district for the doing of this grading.

In considering the benefits of the various boulevard improvements I divided benefit into two classes, one as a sort of a consequential benefit and the other a direct benefit. The consequential benefit could not be controlled because it was the general result of the improvement and did not result from any direct improvement on any particular piece [fol. 206] of land, so that in fixing the boundary lines of any benefit district I tried to determine where the direct benefit from the improvement would be. In arriving at this particular grading improvement I considered that 63rd Street was quite a thoroughfare and that a street car line was contemplated on 67th Street. 63rd Street is also almost a direct entrance to Swope Park and I fixed the direct benefit between those two streets. Furthermore the land between 63rd and 67th Streets was not platted and had no improvements at all at that time, whereas the land north of 63rd Street was more or less platted and that south of 67th Street was platted into small lots.

On cross examination Mr. Lechtman testified as follows:

There is no doubt but that this improvement is a general improvement for the benefit of the whole City but the greatest benefit to property is to the close-by property. The Boulevard was not established merely for the benefit of the immediate property owners but also in order to complete the entire boulevard system, but the establishment of such a boulevard is going to cause an immediate benefit to nearby property.

KELLY BRENT, being duly sworn and examined on behalf of the defendants testified as follows:

I have lived in Kansas City 35 years and have been in the real estate business during all of that time. I have had experience in the platting and selling of acre property mostly within the last 15 years. I have been in Kansas City during all of the development of the park and boulevard system and am familiar with real estate values here. I am familiar with the character of the property in the benefit [fol. 207] district shown on plaintiffs' Exhibit 12 and with the character of the property north and south of that benefit district. In my opinion the benefit district as shown on the plat is a reasonable benefit district for paying the cost of that improvement.

When the boulevard was established all of this ground which is in the benefit district was acre property, unplatted and undeveloped and it was a great benefit to it to be opened up. It is mighty hard to get a thoroughfare like this through a territory that is undeveloped. The property south of 67th Street is platted into small tracts and developed to such an extent in the way of private improvements that it would almost have been impossible for it to have been affected directly by the benefit of this boulevard. There is no direct north and south connection between the property south of 67th Street and Meyer Boulevard, between Prospect Avenue and Swope Parkway. Such a connection would only be possible by winding roads such as have been made, and very beautifully made, in certain portions of the ~~city~~ and most unfortunately this ground south of 67th Street has been platted otherwise.

The property north of 63rd Street is platted into tracts of varying sizes, most of them in tracts from  $\frac{1}{2}$  to  $2\frac{1}{2}$  acres, for residence purposes. That property is built up and considerably improved. The property south of 67th Street is built up to a considerable extent but with small homes. These are my reasons for believing that the property south of 67th Street and north of 63rd Street should not be included in the benefit district.

The idea is that the boulevard opened up and made possible the development of this property which had not already been so far developed as to be interfered with by the improvement. The grading of the Boulevard a block farther south than the line which was the center of this acre territory was an engineering proposition. But the benefit, in my judgment was more directly to the acre property [fol. 208] no matter where the boulevard went through it. In my opinion all of the property in this benefit district benefited by the grading.

I have been asked many times whether as a general rule property abutting upon a boulevard of this kind increases in value more by the grading than property back from the boulevard. This is a question that attorneys are not as conversant with as real estate men. That is one of those questions which you cannot answer by yes or no. In this particular instance the grading of Meyer Boulevard possibly hurt the abutting property. At other places it very materially would enhance the value of the abutting property. Over 50% of the terri-



tory covered by this grading ordinance is way below the grade of the boulevard. By this I mean over 50% of the abutting property and the property on 65th Street would be as much if not more benefited by this grading than that street would be. These general questions are hard to answer.

I think that in this particular case the boulevard is a benefit to the district. Everyone, almost who drives an automobile would, when driving to any section, use the boulevard. If I am going out to the northeast corner of this town I take the boulevard to get there, no matter where I am going. If I am going to Montgall or St. John or Askew or wherever I am going, I go on the boulevard, and after I get into the territory I get off the boulevard and go to the particular place. Any man who drives an automobile would go a quarter of a mile out of his way to get onto one of these boulevards to drive four or five miles after he gets there.

On cross examination Mr. Brent testified as follows:

If I were at 63rd Street and Olive with my automobile I would drive over to Prospect and then south to Meyer Boulevard and then go downtown on the boulevard instead of going to Swope Parkway and downtown that way. Mr. Crittenden and I developed an addition [fol. 209] out there and when we were developing this territory we instructed our salesmen to take their customers out Swope Parkway and over to Meyer Boulevard as being the most pleasant way and best way to get to 63rd Street which was a third of a mile farther than they would have gone if they could have gone out the other way. We platted both of the additions just north of 63rd Street running from Prospect to Swope Parkway.

Under our method of procedure the City necessarily has to fix certain benefit districts and it is very hard for the Council to know just where to draw the line.

I don't see how Swope Park could have received any direct benefit from this improvement because it is a pleasure ground and not used for commercial purposes. I don't know what sort of benefit it could be considered as receiving. If Swope Park was not a park it probably should be in the benefit district and probably would have been included by the ordinance. Waiving for the moment the fact that Swope Park is a park and considering merely the location of the land included in the park, that land probably receives as much direct benefit from the building of the boulevard as the other property out there, but if the park had not been there conditions would have been so different. The boulevard might then just have gone on like any other boulevard and the property which now constitutes Swope Park would not have received any more benefit than any other piece of land through which the boulevard passed. I do not think that Swope Park received a direct benefit from this improvement. If the land in the park had been used for commercial purposes it would have been benefited. The boulevard is of course a benefit to the public, indeed, every citizen of Kansas City is individually benefited, and the opening of the boulevard greatly enhances the value



of Swope Park as a park. It greatly increases the accessibility of the park but I don't know that it makes the park any better after you get there.

[fol. 210] With regard to the property south of 67th Street I don't say that a boulevard through platted property does not benefit the property. What I mean is that property already platted, like the property south of 67th Street is not susceptible to personal and individual development in a manner, for example, along the lines in which Mr. Nichols is developing Crestwood or some place of that kind with winding roads. This acre ground in the benefit district could be and was in a position to be developed differently from that platted property south of 67th Street.

JOHN A. MOORE, being duly sworn and examined on behalf of the defendants, testified as follows:

I have lived in Kansas City 43 years and for 35 years of that time have been in the real estate business. I have had experience in the platting and selling of residence property having platted a number of additions. This experience has extended over the entire 35 years. I have been familiar with the development of the park system in Kansas City and with the effect of that development upon the prices of property. I am also familiar with the real estate values here. I am familiar with the character of the ground within the limits of the benefit district shown on Plaintiffs' Exhibit 12 and am familiar with the grading that has been done on this boulevard and with the physical conditions there.

In my opinion the benefit district established for the assessment of the benefits for the grading of Meyer Boulevard is a reasonable district. I base that opinion upon this theory; that the property which is the benefit district was acre property and undeveloped and unplatted, and not built on, and was susceptible of a better improvement than property that had already been built up. Consequently, [fol. 211] it could respond to the benefits that would come to the neighborhood by the building and construction of this Boulevard. It is practically impossible to change a neighborhood once built up. You can take all the boulevards of this City as you know them and you will find that neighborhoods which were built up with poor buildings when the boulevards were constructed through them continue with poor buildings. It is practically impossible to change the character of property after it has once been established. But with vacant unplatted lands the effect of a boulevard is different. It is possible to develop a large acre tract in some scientific way beneficially, so that it will derive the benefits that come from some great improvement.

The property south of 67th Street has been platted into comparatively small lots and built up with quite small houses. It has been developed sufficiently to characterize the neighborhood. Its character has been established, so much so that it would be practically impossible, in my opinion, to change it.

The property north of 63rd Street had been platted and some im-

provements had been built and a sort of development had been begun there so that it didn't appear wise to undertake to change it. Those are my principal reasons for limiting this district at 63rd Street and 67th Street.

As a general rule in the development of a boulevard, property directly abutting on the boulevard is more favorably affected than that farther back. This is not always the case, however. With regard to this particular improvement the improvement unfortunately practically destroyed a lot of the property fronting on the boulevard. The grading of the boulevard left a lot of the property below grade, some of it, I think as much as 35 feet below grade. I don't know how to develop a piece of property of that kind. It has no value. Such property although abutting on the boulevard would not be benefited as much as property lying further back. The benefit [fol. 212] would be affected in the same manner though in a different degree with property which was not so much below grade.

On cross examination Mr. Moore testified as follows:

In my opinion it would not be fair to assess property left below grade to the same extent as property on grade with the boulevard. It is my notion that a lot 35 feet below the level of the street is not justly chargeable with the same expense as property on grade. In my opinion the benefits following from the grading of a street should not be assessed arbitrarily, but in proportion to the benefits actually received. That would seem the equitable way. Property which, by reason of the topography of the country, is low or inaccessible to the improvement, ought not to be assessed the same amount as the good property.

My theory in connection with the establishment of this benefit district is this. Here we have about 240 acres of land just a mile long, from Brooklyn to Prospect. If some man with a broad vision got hold of the tract it is capable of being made one of the finest developments around Kansas City. In order to get this benefit it should be developed under substantially a unified or a uniform development. It would be very injurious to the property in this benefit district if the various tracts are developed under separate ownership and platted into small insignificant lots with small houses on them. Such a development would absolutely destroy the possibility of large development along the lines I have suggested. I am bound to say that the recent platting and development which has gone on out there in the last year has been shameful. I refer to the Park Gate development.

[fol. 213] Defendants hereupon introduced in evidence the contract for the sale of Park Gate addition. This contract was admitted in evidence by the Court as Defendants' Exhibit "L" and is substantially as follows:

## [fol. 214] DEFENDANTS' EXHIBIT "L" TO MOORE'S TESTIMONY

## Agreement

This agreement made this 14th day of April, 1920, by and between Thomas H. Swope party of the first part, and N. P. Dodge of Omaha, doing business as N. P. Dodge & Co. party of the second part, witnesseth:

First. That whereas the party of the first part owns acreage property in Kansas City, Mo., bounded by Prospect Avenue, Swope Parkway, 65th Street, and 67th St., containing ninety-seven acres more or less which it is proposed to plat into twenty-five foot lots, and is desirous of obtaining the services of the second party as selling agents for said lots, and,

Second. In consideration of the covenant made by the party of the second part, it is agreed and understood that he shall have the exclusive right to sell said land into lots for a period of Two years from date of this contract, and shall receive a commission of fifty dollars (\$50.00) on each lot sold by him or his agents, which commission is paid out of one-half of the proceeds of the sale of each lot, as it is paid for by the purchaser. That is to say, the second party shall receive one-half of the amount paid in on each lot, until his commission is paid, then all payments shall be credited to the party of the first part by the collecting bank. It is also understood and agreed that all payments on the contracts that are cancelled for non-payment or "lapsed," are to be divided share and share alike up to the amount of commission and in case lots are sold again to new purchaser a new commission will be allowed just as if the lots were never sold before.

[fol. 215] Third. In consideration of the above, the second party agrees to have said lots surveyed and staked on street and alley with stakes 2 x 2 x 24 inches, painted white, each stake to be numbered with a lot number, and at each block corner, a sign post to be erected 4 x 9 x 9 feet, with neatly lettered street signs attached, a gas pipe stake to be used at block corners as monuments. The streets are to be graded with a blade machine in a neat form, the grass and weeds are to be cleared off the premises, plowed ground, if any, to be seeded, trees to be trimmed and the property in every way to be made neat and attractive. For this purpose, the party of the first part agrees to bear the expenses of surveying, staking, trimming trees, clearing, seeding, grading of the streets and either to advance the money for these improvements in getting the property ready for sale, or to allow the party of the second part all of the proceeds from the sale of lots until the owners share of such proceeds equals the money actually expended for the purpose above set forth. It is understood and agreed, however, that the expenditure or allowance shall not exceed Twenty-five Hundred Dollars should it exceed that amount, such additional cost shall be borne by the party of the second part.

Fourth. The party of the second part agrees to put on a sale of said lots on terms as follows: All lots fronting on the Meyer Boulevard shall be sold on terms of not less than ten dollars (\$10.00) down and two dollars (\$2.00) a week. The other lots shall be divided into two classes the higher priced lots to sell for five dollars (\$5.00) down and one dollar (\$1.00) a week and the balance for one dollar (\$1.00) down and one dollar (\$1.00) per a week, it being understood that one-half of the lots shall be offered at the minimum terms.

[fol. 216] All contracts to be without interest or regular taxes for two years and allowing a bonus of 10% for all payments of ten dollars or over in advance during the two year period in which no interest is charged and a 15% discount for payment in full within thirty (30) days. The contract to contain reasonable restrictions as to houses. The exact terms of the contract to be issued are set forth in a form attached to this contract, and made a part thereof. No change in the terms of this contract shall take place without the approval of the owner.

Fifth. The second party agrees to put on a sale of said lots in the spring or early summer of 1920, and during the continuance of this contract, to use every effort to sell said lots, the same as he has done on his own and other additions in various cities of the United States. He also agrees to re-sell the lapsed lots, using every endeavor to keep all of the lots sold. If the second party fails to sell one-half of the lots within one year from June 1st, 1921, the party of the first part may cancel his agreement upon thirty days' notice in writing and in the event of such cancellation party of the second part shall have no further claim for commission save on lots sold prior to said cancellation.

Sixth. Party of the first part agrees that he will execute a plat of said addition and will execute all deeds to lots when paid for under the terms of the contract attached hereto, and authorize the party of the second part to sign for him, all contracts at the sale and thereafter, as lots may be sold during the terms of this contract, and he agrees to carry out all covenants of the contract attached hereto, and to furnish a printed copy of abstract on said property with each lot sold, said abstracts to be brought down to date and delivered with deed, when lot is fully paid for.

[fol. 217] Seventh. It is understood and agreed that all payments on contracts for the sale of lots save such payments as are made on the ground at the time of the sale, shall be made at the —, which shall be the collecting bank and the proceeds after deducting the charge of the bank for collecting, shall be divided share and share alike, until the commissions above stipulated are paid, and thereafter all of the proceeds from the sale of each lot shall be credited to the account of the parties of the first part each week, subject to their check. It is understood and agreed that such division of the proceeds shall not take place until the party of the second part is re-

imbursed for the expense of improvements, and preparation for the original sale as provided in paragraph three, out of the share of the parties of the first part, hence all of the proceeds from the sale of the lots shall be credited to the party of the second part until the share of the parties of the first part has equalled the amount expended on the ground, but not to exceed Twenty-five Hundred Dollars, as above provided.

Eighth. The second party agrees to make a price list at which the lots shall be sold and submit it to the party of the first part for his approval before opening the sale, it being agreed that the gross selling price of the lots shall not be less than Three Hundred Thousand Dollars (\$300,000.00).

Ninth. Weekly reports of collections shall be made to both parties by the bank upon collection sheets furnished by the party of the second part, and the second party at his own expense shall send notices each week to delinquent purchasers and shall keep an accurate account of all money paid on contract, so long as he shall have an interest in the sale of the individual lots, it being understood and agreed that the first party save as stipulated in Section 3 of this contract, is to be put to no expense whatever, in connection with the sale of lots save for taxes, abstracts and the collection fee of the collecting bank.

In witness whereof, we have hereunto set our hands and seals this date above written.

Thos. H. Swope, N. P. Dodge.

It is agreed that party of first part may reserve from the sale lots facing Swope Parkway.  
N. P. Dodge.

[fol. 219] Thereupon the Defendants rested their case.

And thereupon all parties hereto, both Plaintiffs and Defendants, rested.

The foregoing is an abstract of all the testimony introduced by either party.

#### IN UNITED STATES DISTRICT COURT

#### ORDER SETTLING CONDENSED STATEMENT OF EVIDENCE

The above and foregoing is hereby approved as a true, complete and properly prepared condensed statement of all the material testimony taken in the above entitled cause, and it is ordered that said statement be filed herein, and made a part of the record in this cause, for the purposes of the appeal heretofore allowed to the United States Circuit Court of Appeals for the Eighth Circuit.

Dated this 4th day of March, 1922.

Arba S. Van Valkenburgh, Judge. O. K. Marley & Reed,  
Attys. for Plaintiff.

[fol. 220] And afterwards, to-wit, on the 24th day of February, 1922, Præcipe for Transcript was filed.

Said Præcipe for Transcript is in words and figures as follows, to-wit:

[fol. 221] IN THE DISTRICT COURT OF THE UNITED STATES FOR  
THE WESTERN DIVISION OF THE WESTERN DISTRICT  
OF MISSOURI

[Title omitted]

PRÆCIPE FOR TRANSCRIPT—Filed Feb. 24, 1922

To the clerk of said Court:

In the preparation of the transcript on the appeal of McMillan Contracting Company, a corporation, and Fidelity National Bank and Trust Company of Kansas City, a corporation, defendants above named, from the order and decree made and entered in the above entitled cause on July 7, 1921, please incorporate the following portions of the record into the transcript:

1. Complainant's first amended bill of Complaint, filed February 3, 1920.
2. Amended separate answer of defendant, Fidelity National Bank and Trust Company of Kansas City, to complainant's first amended bill of complaint, filed January 25, 1921.
3. Memorandum opinion, filed June 28, 1921.
4. Decree of July 7, 1921, cancelling the special tax bills involved in this action.
5. Petition for appeal from said decree, filed January 4, 1922.
6. Assignment of errors filed therewith.
7. Order allowing appeal, entered January 4, 1922.
8. Citation to complainants, with acknowledgment of service thereon, dated January 4, 1922.
9. Bond for appeal, filed and approved January 6, 1922.
10. Election as to printing transcript, filed January 4, 1922.
- [fol. 222] 11. Condensed statement of testimony, prepared pursuant to Equity Rule 75-B, filed February 13, 1922.
12. Notice to complainant of the filing of said condensed statement, with acknowledgment of service thereon, filed February 13, 1922.
13. Præcipe for transcript.

Bowersock & Fizzell, Miller, Camack, Winger & Reeder,  
Clarence S. Palmer, Attorneys for Defendants and Appellants.

Received copy of the above and foregoing præcipe this 23rd day of February, 1922.

Marley & Reed, Attorneys for Complainant.

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[fol. 223] And afterwards, to-wit, on the 27th day of February, 1922, an Order extending the time for filing transcript in the United States Circuit Court of Appeals was filed and entered of record.

Said Order is in words and figures as follows, to-wit:

[fol. 224] IN THE DISTRICT COURT OF THE UNITED STATES FOR  
THE WESTERN DIVISION OF THE WESTERN DISTRICT  
OF MISSOURI

[Title omitted]

ORDER EXTENDING TIME FOR FILING RECORD IN CIRCUIT COURT OF  
APPEALS—Filed Feb. 27, 1922

Now on this 27th day of February, 1922, this cause coming on to be heard on the application in open court made by the above named defendants for an extension of time within which to file in the office of the Clerk of the United States Circuit Court of Appeals of the Eighth Circuit, a transcript of the record in the above entitled cause,

It is now by the court, for good cause shown, ordered, adjudged and decreed that the time within which the above named defendants may file said transcript in the office of the Clerk of said Court for the purposes of the appeal heretofore taken in this cause to the United States Circuit Court of Appeals for the Eighth Circuit, is hereby extended for a period of sixty days from the return day of said appeal.

Arba S. Van Valkenburgh, Judge.

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[fol. 225] And afterwards, to-wit, on the 4th day of March, 1922, a Stipulation relative to forwarding certain original Exhibits to the United States Circuit Court of Appeals was filed.

Also on the same date an Order directing the Clerk to send certain original Exhibits to the United States Circuit Court of Appeals was filed and entered of record.



Said Stipulation and Order are in words and figures, as follows:

[fol. 226] IN THE DISTRICT COURT OF THE UNITED STATES WITHIN  
AND FOR THE WESTERN DIVISION OF THE WESTERN  
DISTRICT OF MISSOURI

[Title omitted]

STIPULATION AS TO EXHIBITS—Filed Mar. 4, 1922

It is hereby stipulated and agreed by and between the parties hereto that the following original exhibits introduced and received in evidence on the trial of this cause, and filed herein, to-wit: Plaintiffs' Exhibits 12, 13, 16 to 23, inclusive, and 25 to 27, inclusive, may be transmitted to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, and that said exhibits may be considered as incorporated in and as a part of the condensed statement of testimony, filed herein pursuant to Equity Rule 75-b, as though actually and fully set out in or attached to said condensed statement.

Marley & Reed, Attorneys for Complainants. Bowersock & Fizzell, Miller, Camack, Winger & Reeder, Clarence S. Palmer, Attorneys for Defendants.

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[fol. 227] IN THE DISTRICT COURT OF THE UNITED STATES WITHIN  
AND FOR THE WESTERN DIVISION OF THE WESTERN  
DISTRICT OF MISSOURI

[Title omitted]

ORDER AS TO EXHIBITS

Now on this 4th day of March, 1922, this cause coming on to be heard, and it appearing to the court that a stipulation by and between the parties hereto has been filed herein, to the effect that certain original exhibits introduced and received in evidence on the trial of this cause, may be transmitted to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, and that said exhibits may be considered as incorporated in the condensed statement of testimony filed herein.

Now, therefore, it is by the court ordered, adjudged and decreed that the following original exhibits introduced and received in evidence on the trial of this cause, to-wit: Plaintiffs' Exhibits 12, 13, 16 to 23 inclusive, and 25 to 27 inclusive, shall be transmitted by the Clerk of this court to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, for use on the hearing of this cause on appeal in said court, and in lieu of the incorporation of said exhibits in the condensed statement of testimony filed herein, to be by said Clerk returned to this court upon the final determination of



said appeal; and said exhibits are hereby incorporated and included [fol. 228] in said condensed statement of testimony and made a part thereof, the same as though actually and fully set out therein.

Arba S. Van Valkenburgh, District Judge.

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[fol. 229] And afterwards, to-wit, on the 10th day of March, 1922, Supplemental Præcipe for Transcript was filed.

Said Supplemental Præcipe for Transcript is in words and figures as follows, to-wit:

[fol. 230] IN THE DISTRICT COURT OF THE UNITED STATES FOR  
THE WESTERN DIVISION OF THE WESTERN DISTRICT  
OF MISSOURI

[Title omitted]

SUPPLEMENTAL PRÆCIPE FOR TRANSCRIPT—Filed Mar. 10, 1922

To the clerk of said court:

In the preparation of the transcript on the appeal of McMillan Contracting Company, a corporation, and Fidelity National Bank and Trust Company of Kansas City, a corporation, defendants above named, from the order and decree made and entered in the above entitled cause on July 7, 1921, please incorporate into the transcript in addition to the portions of the record called for in the præcipe heretofore filed herein on February 24, 1922, the following:

1. Order extending time for filing record in Circuit Court of Appeals, entered February 27, 1922.

2. Stipulation as to forwarding to Clerk of Circuit Court of Appeals plaintiff's original Exhibits 12-13, 16 to 23 inclusive and 25 to 27 inclusive, filed March 4, 1922.

3. Order in accordance with said stipulation, entered March 4, 1922.

4. Supplemental Præcipe for transcript.

Bowersock & Fizzell, Miller, Camack, Winger & Reeder,  
Clarence S. Palmer, Attorneys for Defendants and Appel-  
lants.

Received copy of the above and foregoing supplemental præcipe this 10th day of March, 1922.

[fol. 231] Marley & Reed, By W. Haley Reed, Attorneys for Com-  
plainants.

[fol. 232] And afterwards, to-wit, on the 2nd day of May, 1922, an order extending time for filing transcript was filed and entered of record.

Said Order extending time to file transcript is in words and figures as follows, to-wit:

[fol. 233] IN THE DISTRICT COURT OF THE UNITED STATES FOR  
THE WESTERN DIVISION OF THE WESTERN DISTRICT  
OF MISSOURI

[Title omitted]

ORDER EXTENDING TIME FOR FILING RECORD IN THE CIRCUIT  
COURT OF APPEALS—Filed May 2, 1922

Now on this 2nd day of May, 1922, this cause coming on to be heard on the application in open court made by the above named defendants for an extension of time in which to file in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit a transcript of the record in the above entitled cause,

It is now by the court for good cause shown ordered, adjudged and decreed that the time within which the above named defendants may file said transcript in the office of the Clerk of said Court for the purpose of the appeal heretofore taken in the above named cause to the United States Circuit Court of Appeals for the Eighth Circuit, is hereby extended to July 4, 1922.

Arba S. Van Valkenburgh, Judge.

[fol. 234] And afterwards, to-wit, on the 3rd day of May, 1922, a Second Supplemental Præcipe for Transcript was filed.

Said Second Supplemental Præcipe for Transcript is in words and figures as follows, to-wit:

[fol. 235] IN THE DISTRICT COURT OF THE UNITED STATES FOR  
THE WESTERN DIVISION OF THE WESTERN DISTRICT  
OF MISSOURI

[Title omitted]

SECOND SUPPLEMENTAL PRÆCIPLE FOR TRANSCRIPT—Filed  
May 3, 1922

To the clerk of said court:

In the preparation of the transcript on the appeal of McMillan Contracting Company, a corporation, and Fidelity National Bank and Trust Company of Kansas City, a corporation, defendants above named, from the order and decree made and entered in the above entitled cause on July 7, 1921, please incorporate into the transcript in addition to the portions of the record called for in the præcipes

heretofore filed herein on February 24, 1922, and on March 10, 1922, the following:

1. Order extending time for filing record in the Circuit Court of Appeals entered May 2nd, 1922.

2. Second supplemental præcipe for transcript.

Bowersock & Fizzel, Miller, Camack, Winger & Reeder,  
Clarence S. Palmer, Attorneys for Defendants and Appellants.

Received copy of the above and foregoing second supplemental præcipe this 3rd day of May, 1922.

Marley & Reed, Attorneys for Complainant.

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[fol. 236] IN THE DISTRICT COURT OF THE UNITED STATES FOR  
THE WESTERN DIVISION OF THE WESTERN DISTRICT  
OF MISSOURI

In Equity. No. 163

WALTER L. ABERNATHY and CARRIE S. ABERNATHY, Complainants,

vs.

FIDELITY NATIONAL BANK & TRUST COMPANY et al., Defendants

In Equity. No. 207

B. HAYWOOD HAGERMAN, Complainant,

vs.

FIDELITY NATIONAL BANK & TRUST COMPANY et al., Defendants

In Equity. No. 215

FELIX H. SWOPE et al., complainants,

vs.

FIDELITY NATIONAL BANK & TRUST COMPANY et al., Defendants

#### MEMORANDUM ON FINAL HEARING

These cases involve the validity of certain tax bills issued against the property of complainants to pay for the grading of Meyer Boulevard from the Paseo east to Swope Park. These bills are based upon proceedings instituted under Section 28 of Article 8 of the Charter of Kansas City, Missouri. This section provides that where, in the grading of a street there is an unusual amount of filling, or cutting or grading away of earth or rock, so that the expense imposes too great a burden on and situated in the benefit district, consisting

of property abutting upon the street to be improved, as provided in Section 3 of Article 8, then the cost may be assessed against the property located within a larger benefit district to be fixed by the city council.

[fol. 237] Section 28 further provides for the enactment of an ordinance authorizing the improvement, and that the city shall file a proceeding in the Circuit Court of Jackson County, Missouri, in the name of the city, against the respective owners of land chargeable, and that the prayer of the petition shall be that the court find and determine the validity of the ordinance, and the question of whether or not the respective tracts of land within the benefit district shall be charged with the lien of the work. Service of process shall be governed by the provisions of Section 11 of Article 13 of the Charter, which provide for service by publication. After such court proceedings have been disposed of it is provided that the city may then enter into a contract for the work contemplated, and that after the work has been completed the estimate of the cost thereof, and the apportionment of the same against the various lots, tracts and parcels of land within the benefit district shall be made by the Board of Public Works according to the assessed value thereof, exclusive of improvements, with the assistance of the City Assessor, who shall, on demand of the Board of Public Works, cause an assessment to be made of the value of the lands to be charged with the cost of such grading, and shall deliver such assessment to the Board of Public Works, who shall apportion the cost according to the value thereof fixed by the City Assessor.

Meyer Boulevard, from the Paseo to Swope Park, is a broad highway, being two hundred and twenty feet wide at its narrowest point, and five hundred feet wide as it approaches the park. Provision is made for parkways between the driveways, so that of the total area of the Boulevard only about eleven acres are taken up by the driveways, and the remaining twenty acres consist of grass parkways. The grading includes the entire area. The benefit district extends [fol. 238] approximately one mile in length, and lies between 63rd and 67th Streets, a width of approximately four blocks, which area includes the land taken for the boulevard itself. The grading cost, for which the tax bills were issued, was substantially \$97,000. The total assessed valuation of the benefit district, specially made for the purpose of this improvement, was \$378,955. The rate of assessment to total assessed value is thus found to be approximately 26 per cent.

It appears from the evidence that the City Assessor, in assessing the value of the property in the benefit district, assessed all of the property at substantially the same value per acre, and that all the property was assessed for this special purpose at a value several times that at which it is and was assessed for general tax purposes. This will appear concretely from a consideration of the tracts belonging to complainants.

Tract No. 2, belonging to Gertrude M. Brown, was assessed, for general tax purposes, in the year 1915, at \$4,750; for 1916 at \$4,750; for 1917 at \$5,000. In 1916, for the purposes of this grading, at

\$25,960. The tax bill against this property for this grading was \$6,693.40. Tract No. 3, belonging to Felix H. Swope, was assessed, for general tax purposes, in the year 1915, at \$6,240; for 1916, at \$6,240; for 1917 at \$6,240. In 1916 for Meyer Boulevard at \$25,440. The tax bill against this property for this grading was \$6,558. Tract No. 8, belonging to Felix H. Swope, was assessed, for general tax purposes, in the year 1915, at \$4,470; for 1916 at \$4,470; for 1917 at \$4,320. In 1916 for Meyer Boulevard at \$29,250. The tax bill against this property for this grading was \$7,540.20. Tract No. 11, belonging to B. Haywood Hagerman, was assessed, for general tax purposes, in the year 1915, at \$12,480; for 1916 at \$12,480; for 1917 at \$10,350. In 1916 for Meyer Boulevard at \$48,535. The tax bill against this property for this grading was \$12,511.60. Tract No. 14, belonging to Carrie S. Abernathy, was assessed, for general [fol. 239] tax purposes, in the year 1915, at \$3,400; for 1916 at \$6,400; for 1917 at \$6,400. In 1916 for Meyer Boulevard at \$24,920. The tax bill against this property for this grading was \$6,424. Tract No. 15, belonging to Carrie S. Abernathy, was assessed, for general tax purposes, in the year 1915, at \$6,000; for 1916 at \$6,000; for 1917 at \$6,000. In 1916 for Meyer Boulevard at \$24,570. The tax bill against this property for this grading was \$6,333.80. It will thus appear that for the year 1916 these tracts, in the aggregate, were assessed for general tax purposes at a value of \$40,340; that in the following year, after the Meyer Boulevard improvement, which is claimed to have added value in the way of benefits, had become a fixed fact, the same assessor assessed this same ground for general tax purposes at an aggregate of \$38,310; more than \$2,000 less than the previous year; that in 1916 these same tracts, in the aggregate, for the purposes of this grading, were assessed at \$188,680; a little less than five times the value at which they were assessed during the same year for general tax purposes. It further appears that the tax bills issued against these tracts, for this improvement, aggregate \$46,061; nearly \$6,000 more than the assessed valuation for general tax purposes in 1916, and nearly \$8,000 more than they were assessed for the same purposes in 1917. It further appears that these tracts, practically unimproved suburban property, were assessed to pay almost one-half of this entire improvement, at an average rate of over \$350 an acre.

Meyer Boulevard, with its heroic proportions, was conceived for the purpose of establishing an inspiring approach to Swope Park, the great playground of Kansas City, and incidentally as a thoroughfare into which, directly and indirectly, the boulevard system of Kansas City might discharge the throngs of pleasure seekers and [fol. 240] pleasure drivers who visit that park. It is altogether an appropriate and desirable enterprise for the gratification of the public at large, and its chief value is to the public at large, and to the city property to which it is tributary, and only very incidentally to the locality through which it passes. Notwithstanding this fact, the Board of Public Works assessed no part of the benefits against the city at large, nor against the property of the city, which would indirectly effect the same purpose, although that seems to have been

contemplated by Section 28, by the ordinance authorizing the improvement, and by the petition filed in the Circuit Court. That court, as shown by its order, may well have contemplated, and undoubtedly did contemplate, that a portion of the whole cost would be charged against the city. The Board of Public Works, however, imposed the entire burden upon the private property within the benefit district.

Many points are urged by complainants against the regularity of the proceedings and the validity of the tax bills. It is claimed that the method of apportionment provided for in Section 28 of Article 8 of the Charter, is fundamentally so unfair and unjust as to result in the taking of property without due process, in violation of the 14th Amendment to the Federal Constitution; that the tax assessed against the property in question exceeds the special benefits received to such an extent as to result in the taking of the property without due process; that this is a general public improvement, and not a local one; that the benefit district is unreasonable; that the Circuit Court proceeding is an essential step in the grading procedure, and was not followed with sufficient strictness, in that a suit was not brought in the name of Kansas City, and the parties charged were not [fol. 241] named; that that proceeding was, in effect, a moot one without recognition in the judicial procedure of the state, binds no one, and that the decree entered cannot be urged as *res adjudicata*. They also claim that the benefits were not apportioned equitably, and with a due regard for actual benefits.

Defendants reply that the grading is of such a nature that its cost may lawfully be charged against a local benefit district; that the benefit district is a reasonable one; that distribution of cost in proportion to assessed valuation is a proper method of apportionment; that the amount of benefit to the particular tracts in question cannot be inquired into in this proceeding; that the suit in the Circuit Court is such a proceeding as comports with due process of law and affords sufficient opportunity to be heard on the questions involved; that Section 28 was duly complied with; that all questions raised, or which could have been raised, in the Circuit Court proceeding are now *res adjudicata*; and chiefly, that if a legislative body charges the cost of an improvement upon lands which it deems to have benefited therefrom, the courts must accept the legislative determination.

Both parties, in exhaustive and learned briefs, have cited abundant authority to sustain their several contentions and each of them, regard being had for the special facts, circumstances and emergencies which control the cases cited. It will serve no useful purpose, and it is beyond the limit of practical possibility in this memorandum, to analyze, discuss and distinguish the authorities adduced and the doctrines there announced. I am of opinion, that the Charter Section involved is susceptible of such arbitrary application as to amount, if such be the course pursued, in view of presumptions generally indulged and of the development of decisions, seeking carefully to preserve, and not too greatly to hamper the exercise of municipal sovereignty for the common good, to a burden upon [fol. 242] private property almost, if not quite, to the point of con-

fiscation. It may be that the suit as entitled would be held to conform analogously to city condemnation proceedings in general, but it must be confessed that the provisions for notice and hearing approach very closely to the frontier of judicial recognition. The proceeding in the Circuit Court is a mere adjunct to the legislative action of the council, and the issues made in that suit, if not wholly abstract in their nature, at least fall far short of contemplating a complete adjudication upon all matters with which those whose property is to be taken for public use are vitally concerned. "It may well be doubted (as said by Mr. Justice Brewer in *Tregea vs. Modesto Irrigation District*, 164 U. S. 179) whether the adjudication really binds anyone." However, I do not feel justified in going so far as to declare the Charter Section itself to be wholly unconstitutional and void; nor is this necessary. Counsel for defendants concede the settled rule to be that a state legislature, and, of course, a city council, may create taxing districts to meet the expense of local improvements, and may fix the basis of taxation without encountering the 14th Amendment unless its action is palpably arbitrary or a plain abuse. They say: "This legislative power is, however, not unlimited. It is subject to the limitation that its exercise must not be arbitrary or unreasonable." It must be admitted that:

"If the statute providing for the tax is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred the law cannot stand against the complaint of one so taxed in fact."

*Gast Realty Co. vs. Schneider Granite Co.*, 240 U. S. 55;

*Kansas City Southern Ry. Co., et al. vs. Road Improvement Dist. No. 6 of Little River Co., Ark.* (Supreme Court of the United States, decided June 6, 1921.)

[fol. 243] The defense contends, however, that complainants herein cannot raise this question because of the Circuit Court proceeding. To this I cannot agree. Finally, defendants concede that the fairness of the Assessor's valuation remains open to the consideration of whether it was arbitrary and unreasonable. I think this may be properly considered in connection with the action taken in defining the benefit district, and that when these two questions are disposed of it will be unnecessary to consider the other criticisms made and the defenses interposed.

What was done in this case appears clearly from the evidence as well as from common knowledge of procedure. It was desired to establish this super-boulevard, and it was realized that the expenditure would be entirely too burdensome if charged against the abutting property, as is usual in grading proceedings. Therefore, resort was had to Section 28 of Article 8, which was intended to relieve in a situation of this sort. But merely adopting the form prescribed by Section 28 does not necessarily afford such relief in practice.

Next, as appears from their testimony, the municipal representatives, Boards and Council, felt themselves more or less circumscribed



and limited by physical conditions. They did not feel justified in going beyond 63rd Street on the north and 67th Street on the south because of their conception of such physical conditions. They, therefore, deemed themselves confined to the restricted benefit district established. Now, while we may say that this involved the exercise of judgment and discretion in excluding property which was left out, all of which, in the condemnation proceeding, was deemed to be benefited by the establishment of this boulevard, there was very little exercise of judgment and discretion as to reasonable benefits respecting the territory included. The dominant idea was that the boulevard must be established in any event, and this benefit district [fol. 244] was arbitrarily selected to produce the funds. Although the improvement was primarily of benefit to the city at large, assessment against the city or its property was not considered because of the well known fact that the city had no funds which could be spared for this purpose. But the assessed valuation of the property in the benefit district for general tax purposes aggregates no more than the cost of grading. This would never do, because such an assessment would be obvious confiscation, not of a single isolated lot, but of the entire benefit district. Therefore, an arbitrary assessment was made, presumably with the assistance of the same Assessor who makes the assessments for general tax purposes, amounting, as we have seen, to nearly five times the normal assessed valuation. Now, while property of this nature is not assessed at full valuation for general purposes, no one will contend that it is assessed at practically only one-fifth of its actual value. Thirty to forty per cent on city property would be the lowest acceptable figure. This property, for this improvement, is charged with considerably more than its entire assessed valuation for general tax purposes. It sufficiently appears that these tax bill-amount to more than one-third of the actual value, and that the benefit to complainants' property, if any, is negligible. Such assumed benefit is entirely speculative and bears no reasonable relation, in any view, to the amount of the tax.

It appears that Meyer Boulevard lies to the south of those tracts and furnishes no direct thoroughfare to the city, which lies almost entirely to the north and west; besides, ample routes to the city, for all purposes, already exist. Swope Parkway, itself a very broad and commanding boulevard, runs along the eastern boundary; and 63rd street, up to that time a recognized thoroughfare, bounds most of these tracts upon the north.

[fol. 245] I find, for the reasons stated, as disclosed by the record, that both the benefit district and the assessment were arbitrary and unreasonable, and that the tax bills unreasonably exceed any possible benefit to this restricted benefit district.

The court is not unmindful of the necessity of recognizing liberal power in municipalities to provide for public improvements, even such as that under consideration, although this is not of the class, under the circumstances disclosed, which is essential to the public health and safety, which sometimes calls for the exercise of more arbitrary and summary municipal power. To uphold this proceeding would be a practical recognition that the power of the city in



such matters is unlimited, and that its exercise is not open to individual challenge in any case.

In *Norwood vs. Baker*, 172 U. S. 269, the Supreme Court of the United States said:

"In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. We say "substantial excess" because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment."

To this may be added the language of the Supreme Court of Missouri in *McCormack vs. Patchin*, 53 Mo. 33:

"The whole theory of local taxation or assessments is that the improvements for which they are levied afford a remuneration in the way of benefits. A law which would attempt to make one person, or a given number of persons, under the guise of local assessments, pay a general revenue for the public at large, would not be an exercise of the taxing power, but an act of confiscation."

And finally the language of Judge Agnew in the *Washington Ave.* [fol. 246] case, 69 Pa. State Reports, 352, is pertinent and applicable to the principle here involved.

"In questions of power exercised by agents, it is sometimes the misfortune of communities to be carried step by step, into the exercise of illegitimate powers, without perceiving the progression, until the usurpation becomes so firmly fixed by precedents it seems to be impossible to recede or to break through them."

This case is cited with approval in *Norwood vs. Baker*, 172 U. S. 285. The court is further mindful of the fact that the improvement has been made, the work has been done, the money has been spent, and much of it probably has been advanced upon the faith of the validity of this proceeding; but this is always the case, and we must not lose sight of the fact that one of the arguments made in support of the insistence that complainants in this and similar cases have not been denied due process of law is that all defenses of this nature may be made in a suit upon the tax bills, or in proceedings like those at bar for the protection of those whose lands are taken or taxed for public purposes. In fact, complainants are practically remitted to this remedy.

It follows necessarily then that the present status of the parties who are charged with knowledge of the law and of the power of public officers, can, and should, have no controlling influence upon this decision.

The relief prayed by petitioners will be granted and decrees to that effect may be prepared and entered.

Kansas City, Missouri, June 28th, 1921.

Arba S. Van Valkenburgh, Judge.

[fol. 247]

IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA, set:

I, Edwin R. Durham, Clerk of the District Court of the United States for the Western Division of the Western District of Missouri, do hereby certify that the foregoing is a full, true and complete transcript of the record, assignments of error, and all proceedings in the case wherein B. Haywood Hagerman is plaintiff and McMillan Contracting Company and Fidelity National Bank and Trust Company of Kansas City are defendants, as fully as the same appears on file and of record in my office, in accordance with præcipes filed herein and made a part hereof.

I further certify that the original citation is prefixed hereto and returned herewith.

Witness my hand as Clerk, and the seal of said Court. Done at office in Kansas City, Missouri, this 30th day of June, A. D. 1922.

Edwin R. Durham, Clerk, By ———, Deputy Clerk.

[Seal of the United States District Court, Western Division, Western District of Missouri.]

Filed Jul. 10, 1922. E. E. Koch, Clerk.

[fol. 248] UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH  
CIRCUIT

No. 6134, September Term, A. D. 1922

McMILLAN CONTRACTING Co. et al., Appellants,

vs.

WALTER L. ABERNATHY et al., Appellees

Appeal from the District Court of the United States for the Western  
District of Missouri

No. 6135, September Term, A. D. 1922

McMILLAN CONTRACTING Co. et al., Appellants,

vs.

B. HAYWOOD HAGERMAN, Appellee

Appeal from the District Court of the United States for the Western  
District of Missouri

No. 6136, September Term, A. D. 1922

FIDELITY NATIONAL BANK AND TRUST Co. et al., Appellants,

vs.

FELIX H. SWOPE et al., Appellees.

Appeal from the District Court of the United States for the Western  
District of Missouri

Motions to Dismiss the Appeals

Mr. H. M. Langworthy (Mr. O. H. Dean, Mr. Roy B. Thomson and Mr. Melville W. Borders were with him on the brief), for appellees in No. 6134.

[fol. 249] Mr. A. S. Marley and Mr. W. H. Reed filed brief for appellees in No. 6135.

Mr. E. H. Jones (Messrs. Scarritt, Jones, Seddon & North and Mr. Edward L. Scarritt were with him on the brief), for appellees in No. 6136.

Mr. Justin D. Bowersock (Mr. Robert B. Fizzell, Mr. Arthur Miller, Mr. Maurice H. Winger, Mr. Clarence S. Palmer, Mr. Frank P. Barker and Mr. G. V. Head, were with him on the brief), for appellants.

OPINION—Filed Oct. 23, 1922

Before Lewis and Kenyon, Circuit Judges, and Munger, District Judge.

Per Curiam:

Motions to dismiss the appeals in these cases have been made, upon the ground that the appeals could be taken only to the Supreme Court of the United States. The suits sought to have decrees entered declaring certain assessments and levies of special taxes against land in Kansas City, Missouri, to have been illegally imposed, and declaring them to be no lien against the land of the complainants. The asserted grounds for relief were, that a portion of the state statutes of Missouri, known as the Kansas City charter, and the city ordinance enacted to carry into effect this portion of the charter were in violation of the constitution of the United States, and also that this and other provisions of this charter and ordinance were not followed in the proceeding leading to the assessments.

The jurisdiction of the court in the first two cases to entertain the case depended upon the assertion of the conflict of the local statutes with the Constitution of the United States, as there was no allegation of diversity of citizenship nor allegation of any other ground of jurisdiction. The decree was in favor of the complainants. It is settled that where the jurisdiction of the court depends only upon the ground that the cause of action arises under the Constitution of the United States, the Circuit Court of Appeals has no jurisdiction to review the case, as an appeal in such a case must be sought in the Supreme court of the United States, under Sections 128 and 238 of the [vol. 250] Judicial Code. *American Sugar Refining Co. v. New Orleans*, 181 U. S. 277, 281; *Huguley Mfg. Co. v. Galtion Cotton Mills*, 184 U. S. 290, 295; *Union and Planters' Bank v. Memphis*, 189 U. S. 71, 73; *Vicksburg v. Waterworks Co.*, 202 U. S. 453, 458; *Carolina Glass Co. v. South Carolina*, 240 U. S. 305, 318; *Raton Water Works Co. v. Raton*, 249 U. S. 552, 553; *Lemke v. Farmers' Grain Co.*, — U. S., —, 42 Sup. Ct. Rep. 244; *Grammer v. Fenton*, 268 Fed. 943, 945.

In the third case now before the court, No. 6136, the jurisdiction of the court was invoked upon the same assertions of a violation of the Constitution of the United States, and also because of diversity of citizenship of the parties. In such a case an appeal lies to the Circuit Court of Appeals. *American Sugar Refining Co. v. New Orleans*, 181 U. S. 277, 281; *Lemke v. Farmers' Grain Co.*, — U. S., —, 42 Sup. Ct. Rep. 244; *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397, 407. A further ground urged for the dismissal of case No. 6136 is a failure of appellants to have the case docketed within the period limited as the return day. The record was received by the clerk of this court within that period, but because the docket fee was not then paid, the case was not docketed for several days after the return day. No injury is shown to have occurred to appellees because of this delay and no motion to dismiss the appeal was made before the case was docketed. The delay is therefore no ground for

dismissal. *Equitable Life Assur. Co. v. Tolbert*, 145 Fed. 338, 339; *Gould v. United States*, 205 Fed. 883, 885. The motion to dismiss appeal in No. 6136 will be denied.

In the other two cases our attention has been called to the Act of Congress approved September 14, 1922, adding Section 238a to the Judicial Code, which reads as follows:

"If an appeal or writ of error has been or shall be taken to or issued out of, any Circuit Court of Appeals in a case wherein such appeal or writ of error should have been taken to or issued out of the Supreme Court, or if an appeal or writ of error has been or shall be taken to, or issued out of, the Supreme Court in a case wherein such appeal or writ of error should have been taken to, or issued out of, a Circuit Court of Appeals, such appeal or writ of error shall not for such reason be dismissed, but shall be transferred to the proper court, which shall thereupon be possessed of the same and shall [fol. 251] proceed to the determination thereof, with the same force and effect as if such appeal or writ of error had been duly taken to, or issued out of, the court to which it is so transferred."

Appellees claim that no transfer of these cases to the Supreme Court should be ordered under this statute, because the appeals were not applied for within three months after the entry of the decree (Sec. 6, Ch. 448, 39 Stats. 726) and therefore that the Supreme Court would have no jurisdiction to entertain the appeal. This is a question that is more properly determined by the court whose authority is questioned. An order will be entered transferring the appeals in cases numbered 6134 and 6135 to the Supreme Court of the United States.

[File endorsement omitted.]

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[fol. 252] UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, SEPTEMBER TERM, 1922, MONDAY, OCTOBER 30, 1922.

[Title omitted]

#### ORDER TRANSFERRING CAUSE TO U. S. SUPREME COURT

This cause came on to — heard on the motion of appellee for an order dismissing the appeal herein, and was argued by counsel.

On consideration whereof and of the provisions of the Act of Congress approved September 14, 1922, adding Section 238A to the Judicial Code, and this Court being of the opinion that the appeal in this cause should be transferred to the Supreme Court of the United States, It is now here ordered by this Court that said appeal be, and the same is hereby transferred to the Supreme Court of the United States in pursuance of said Act of Congress, and the Clerk of this Court is hereby directed to transmit to said Supreme Court

the transcript of the record as received from the District Court of the United States for the Western District of Missouri, together with a certified copy of this order and of the opinion of this Court herein, without making charge for said transcript of record which is certified by the Clerk of the District Court.

October 30, 1922.

[fol. 253] UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

CLERK'S CERTIFICATE

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript of record consisting of pages A, B, and 1 to 247 inclusive, is the transcript of the record received from the District Court of the United States for the Western Division of the Western District of Missouri in the case of McMillan Contracting Company, a corporation, et al., Appellants, vs. B. Haywood Hagerman, and filed and docketed in said Circuit Court of Appeals on July 10, 1922, as No. 6135.

I do further certify that said transcript of record is hereby transmitted to the Supreme Court of the United States pursuant to the opinion and order of said Circuit Court of Appeals filed and entered on October 23 and 30, 1922, respectively, and of which full, true and complete copies are hereto attached.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 24th day of November, A. D. 1922.

E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. [Seal United States Circuit Court of Appeals, Eighth Circuit.]

[Endorsed:] U. S. Circuit Court of Appeals, Eighth Circuit, September Term, 1922. No. 6135. McMillan Contracting Company, et al., Appellants, vs. B. Haywood Hagerman. Transcript of Record from Circuit Court of Appeals under Act of Congress approved September 14, 1922.

Endorsed on cover: File No. 29,287. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 168. McMillan Contracting Company and Fidelity National Bank & Trust Company of Kansas City, appellants, vs. B. Haywood Hagerman. Filed December 16th, 1922. File No. 29,287.

APR 9

WM. P. ST

IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1922.

McMILLAN CONTRACTING COMPANY, a  
corporation, and FIDELITY NATIONAL  
BANK AND TRUST COMPANY OF  
KANSAS CITY, a corporation,

*Appellants,*

v.

No. 100

B. HAYWOOD HAGERMAN,

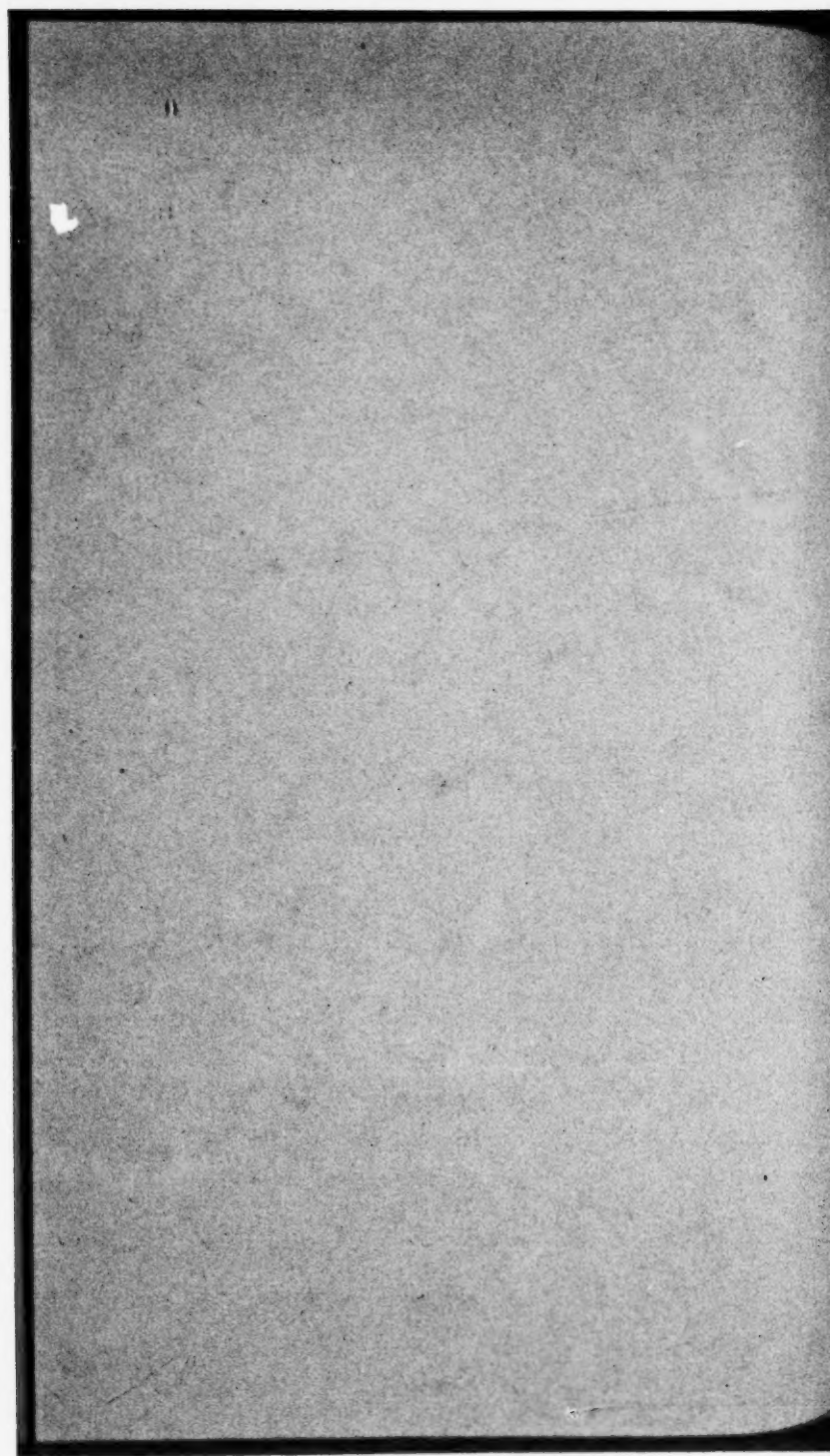
*Appellee.*

**Appellants' Brief on Motion to Dismiss**

JUSTIN D. BOWERBROOK,  
ARTHUR MILLER,  
SAM'L J. McCULLOUGH,  
FRANK P. BARKER,  
G. V. HEAD,

*Attorneys for Appellants.*





IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1922.

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McMILLAN CONTRACTING COMPANY, a  
corporation, and FIDELITY NATIONAL  
BANK AND TRUST COMPANY OF  
KANSAS CITY, a corporation,

*Appellants,*

v.

No. 737

B. HAYWOOD HAGERMAN,

*Appellee.*

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**Appellants' Brief on Motion to Dismiss**

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STATEMENT.

This case, originally appealed from the District Court of the United States for the Western Division of the Western District of Missouri to the Circuit Court of Appeals for the 8th Circuit, has, by the latter court, been transferred here, pursuant to the Act of Congress approved September 14, 1922, amending the Judicial Code by adding thereto

Section 238-a. *McMillan Contracting Co. et al. v. Abernathy et al.*, 284 Fed., 354.

This act, providing for the transfer between the Supreme Court and the respective Circuit Courts of Appeals, of appeals taken to the wrong court, was passed by Congress to remedy the situation referred to by Chief Justice Taft in an address before the American Bar Association at San Francisco. This address is published in the Association Journal for October, 1922, the following excerpt being found at pages 603 and 604:

"The statutes defining the jurisdiction of the Supreme Court and Circuit Courts of Appeals are not as clear as they should be. It is necessary to consult a number of them in order to find exactly what the law is, and I regret to say that without clarification by a revision, the law as to the jurisdiction of the Supreme Court and the Circuit Courts of Appeals is more or less a trap in which counsel are sometimes caught."

This case presents an illustration of this "trap" and falls within the express terms of the Act, if, as held by the Circuit Court of Appeals, the appeal to it was erroneous.

Appellants contend that the appeal was properly taken to the Circuit Court of Appeals, and that that court erred in refusing to assume jurisdiction and in transferring the case to this court. Accordingly appellants have filed herein a motion to remand the cause to the Court of Appeals, or to hear and determine the same as upon certificate from said Court of Appeals under Sections 239, 240 and 264 of the Judicial Code. Appellants' contentions respecting

the propriety of the appeal to the latter court are embraced in a memorandum filed with the motion to remand. For the reasons set forth in that memorandum appellants insist that the Act of September 14, 1922, was improperly invoked.

However, if the position taken by the Court of Appeals respecting its jurisdiction of the case be sustained by this court, the Act of Congress of September 14, 1922, applies, and appellees' motion to dismiss should be denied.

Appellees contend that the Act in question, so far as it refers to appeals taken before its passage, is unconstitutional; that the judgment in the lower court became final upon the expiration of three months' period allowed for an appeal to this court; and that rights in, to and under said judgment thereupon became vested and absolute and free from the effects of subsequent legislation. The facts are not controverted: that the judgment in the District Court was rendered July 7, 1921; that the appeal to the Court of Appeals was allowed January 4, 1922, more than three months, but less than six months, thereafter; and that the Act of September 14, 1922, was passed and approved while the case was pending on a motion to dismiss in the Court of Appeals.

Beyond question the Act, as applied to the appeal in this case, is constitutional. If the position taken by the Court of Appeals as to its jurisdiction is correct, the remedy provided by the Act was properly invoked by that court, and under its terms and pursuant to the order of the Court of Appeals this court should hear and determine the cause in the same manner as if directly and duly appealed to this court.

## ARGUMENT.

Section 238-a of the Judicial Code, approved September 14, 1922, applies to the appeal in this case, and confers jurisdiction upon the Supreme Court to proceed to the determination thereof.

The only provision in the Constitution of the United States which might prevent the application of the Act to this appeal is that part of the Fifth Amendment prohibiting the deprivation of life, liberty or property without due process of law. The restriction in Article I, Section 9 of the Constitution, as to the passage of *ex post facto* laws, has no application, since that prohibition relates to criminal and penal laws only.

*Calder v. Bull*, 3 Dall. 386;

*Duncan v. Missouri*, 152 U. S. 377, 14 S. Ct. 570;

*Mallett v. North Carolina*, 181 U. S. 589, 21 S. Ct.

730.

And except to the extent that the impairment of contracts is a violation of the due process clause, there is nothing in the Constitution making an Act of Congress invalid as an impairment of the obligation of contracts. Article 1, Section 10, with respect to such laws, is, by its terms, a restriction on the power of the state, and not of the national government.

Hence the Act is constitutional in its application to this case *unless appellees had a property right in the judg-*

*ment below, of which they were deprived, without due process to law, by the order of the Circuit Court of Appeals transferring the case to this court.*

The motion to dismiss is based on the contention that the Act divests *vested rights* under the judgment. It is to be noted that the words "vested rights" appear nowhere in the Constitution. Rights, vested or otherwise, are protected under the Fifth Amendment only as embraced within the term "property". What *property* had appellee in the judgment below? Of what property in said judgment has appellee been deprived by Section 238-a of the Judicial Code? If any, is that deprivation pursuant to due process of law?

# I.

1. Appellee's whole argument is that the Act of September 14, 1922 cannot constitutionally be made to apply to judgments then final. This argument ignores the circumstance that an appeal was pending in this case at the time of the passage of the Act. Appellants insist that the pendency of the appeal eliminates all question of the propriety of a retroactive application of the statute. The Act has not been applied retroactively. No final judgment has been affected.

Even if the Circuit Court of Appeals was without jurisdiction, the case was nevertheless pending in that court on appeal. The order of the District Court, entered January 4, 1922, granting an appeal to the Court of Appeals, was not void, but on the contrary suspended the operation of

the judgment below, and transferred the case to the appellate court.

This proposition of law, as to the effect of such an appeal, has been declared by the courts on many occasions. The case of *Smith v. Chytraus*, 152 Ill. 664, 38 N. E. 911, is a leading decision on the point. In that case the order of the lower court gave plaintiff certain relief on condition that he pay to defendant, within sixty days from the date of the order, a certain sum of money. An appeal was taken from said order and decree to the State Court of Appeals. Thereafter a motion to dismiss was sustained in said court, on the ground that the appeal should have gone to the State Supreme Court, rather than to the Court of Appeals, and that the latter court was without jurisdiction. The case was then redocketed in the lower court. In the meantime a period of more than sixty days from the date of the decree had expired, and accordingly defendant prayed the lower court for an order of dismissal, in as much as plaintiff had failed, within the sixty day period, to make the payment upon which the relief was conditioned. The court thereupon entered a final order of dismissal. On error to the Supreme Court this order is reversed. The Supreme Court holds that the appeal to the Court of Appeals, although that court was without appellate jurisdiction of the case, nevertheless operated as an appeal, and was valid as such until dismissed, and stayed and suspended the operation of the judgment below, and that the time during which the appeal was pending should be deducted from the sixty days allowed by the original order. The following portion of the opinion deals with that question (p. 669):



"It is urged by defendants in error that the appeal that was allowed and that was taken was an appeal to the appellate court, that the appellate court had no jurisdiction to entertain the appeal, and that, therefore, the appeal was void and of no effect, and that it follows that the restraining of further proceedings implied from an appeal to a court which has no jurisdiction to entertain such appeal must be without any effect also. The premises may be conceded, but we think the conclusions do not follow. In *Reynolds v. Perry*, 11 Ill. 534, Perry brought suit against Reynolds, and recovered judgment for costs only. Reynolds prayed an appeal to this court, and it was granted to him, and he perfected his appeal by filing an appeal bond. At that time the statute only allowed appeals where the judgment, exclusive of costs, amounted to the sum of \$20, or related to a franchise or freehold. It was held that the appeal was improvidently granted, but also held that it restrained Perry from collecting his judgment. It was the right of the defendants to pray for an appeal. It was the province of the court to determine to what court of review or appellate jurisdiction the case was appealable, and to fix the terms on which the appeal might be taken. We said in *Hake v. Strubel*, 121 Ill. 321, 12 N. E. 676: 'The making of the order allowing appeal and fixing the amount of the bond, and the time in which the bond and bill of exceptions in the cause shall be presented and filed, is a judicial act, which can only be performed by the judge in term time, and when sitting as a court. The making of the order is an exercise of the judicial power vested in the presiding judge, but the order when made is the order of the court.' The court, then, when it granted an appeal to the appellate court, was acting judicially, and in respect to a matter that was specially committed to its charge by the statute. It had jurisdiction of the parties and of the subject-matter, and what it did, although it may have been erroneous was not absolutely void and of no effect.

The parties had a right to rely upon it, and were bound by it, until it was set aside by some court lawfully authorized so to do. Sometimes it may be a matter of great doubt to what court a particular suit or proceeding is properly appealable. The trial court, in the first instance, must determine that question, and it determines it judicially, by an exercise of the judicial power that is vested in it. \* \* \*

Our conclusion, then is that the appeal herein to the appellate court, even though granted to a tribunal that had no jurisdiction to entertain it, operated for the time being as an appeal, and became a supersedeas, and temporarily stayed all proceedings whatever to enforce the execution of the decree."

The case of *Daly v. Kohn*, 230 Ill., 436, 82 N. E., 828 is to the same effect. The court reiterates that an order allowing an appeal to the Court of Appeals transfers the case to that court, even though that court has no jurisdiction of the appeal, and that proceedings below are stayed until the appeal is dismissed.

A similar question arose in *Merrifield v. Western Cottage Piano Co.*, 238 Ill. 526, 87 N. E. 379. Appellee there contended that the proceedings below should not be stayed by the appeal which had been taken, because the appeal was from an interlocutory order, from which no appeal was allowable. The court disposes of this contention thus:

"Appellant contends that said order of February 18th was a final and appealable one, while appellee contends that it was interlocutory and not appealable. However that may be, the appeal was allowed as prayed, and after the filing and approval of the appeal bond that question was transferred to the Appellate Court for its decision.

When an appeal is perfected, the jurisdiction and control of the court below ceases, and the appeal becomes a stay of all proceedings to enforce the execution of the judgment or decree. *Smith v. Chytraus*, 152 Ill. 664, 38 N. E. 911; *Cowan v. Curran*, 216 Ill. 598, 75 N. E. 322; *Bower v. Chicago West Division Railway Co.*, 136 Ill. 101, 26 N. E. 702, 12 L. R. A. 81; *A. R. Barnes & Co., v. Typographical Union*, 232 Ill. 402, 83 N. E. 932, 14 L. R. A. (N. S.) 1150."

The case of *American Button-Hole, Overseaming & Sewing Machine Co. v. Gurnee*, 38 Wis. 533, also establishes that an appeal from an interlocutory order, although such an order is not appealable, is not a nullity, but is operative until dismissed.

It has also been held that the allowance by the court of an appeal to a party who had no right to appeal, transfers the case to the appellate court, and that any action taken by the lower court thereafter, while such appeal is pending, is void and will be set aside.

*Baasen v. Eilers*, 11 Wis. 277.

When the lower court grants an appeal from the judgment or decree, the jurisdiction of that court ceases, and it cannot disregard the appeal and proceed to carry the judgment into effect, nor can it pass upon the legality of the appeal.

*Dunbar v. Dunbar*, 5 W. Va. 567.

In *Pemberton v. Zacharie*, 5 La. Ann. 310, the court treats of the matter thus:

"We consider it clear, that after the inferior court granted the appeal, its cognizance of the case in the issue joined on these exceptions terminated, until that appeal was disposed of. The case could not be pending on this point in the supreme court and the district court at the same time. (page 314).

It has been contended that as this court has decided that the appeal was improperly granted, it could not have had the effect of suspending proceedings in the inferior court. But it is obvious that the effect of an appeal does not depend on the ultimate disposition which may be made of it, but on the fact that it is pending and undecided." (page 315).

There are many decisions to the effect that a judgment from which an appeal is pending cannot be pleaded as an adjudication in bar of a subsequent suit between the same parties involving the same subject matter.

*Edwards v. Bodkin*, 267 Fed. 1004;

*Eastern Bldg. & Loan Assn. v. Welling*, 103 Fed. 352;

*Delk v. Yelton*, 103 Tenn. 476, 53 S. W. 729;

*Day v. De Younge*, 66 Mich. 550, 33 N. W. 527;

*Fassler v. Streit*, 92 Neb. 786, 139 N. W. 628;

*Purser v. Cady*, 120 Cal. 214, 52 Pac. 489.

There can manifestly be no vested property right in a judgment, which is so far suspended that its existence cannot be pleaded or proven in a suit involving the very rights involved in the judgment.

The proposition that an appeal was pending in this case at the time of the passage of the Act of September 14, 1922, is supported by decisions to the effect that the filing of a suit in a court without jurisdiction of the same suspends the running of the statute of limitations. The filing of such a suit is held to be the commencement of an action. There are many such decisions:

- Smith v. McNeal*, 109 U. S. 426;  
*McCormick v. Eliot*, 43 Fed. 469;  
*Woods v. Houghton*, 1 Gray (Mass.) 530;  
*Little Rock, M. R. & T. Ry. Co. v. Manees*, 49 Ark.  
 248, 4 S. W. 778;  
*Pittsburg, C. C. & St. L. Ry. Co. v. Bemis*, 64 Oh.  
 St. 26, 59 N. E. 745;  
*Lamb v. Howard*, 102 S. E. 436 (Ga.);  
*Wilbourne v. Mann*, 81 So. 816 (Ala.);  
*Blume v. New Orleans*, 29 So. 106 (La.);  
*Atlanta, K. & N. Ry. Co. v. Wilson*, 47 S. E.  
 366 (Ga.);

2. It must be clear from the above authorities that the case was pending on appeal in the Circuit Court of Appeals at the time of the passage of Section 238a of the Judicial Code. Such being the fact, there is no constitutional objection to the application of the Act. The statute as applied to this case simply validates an appeal improperly taken, pending at the time of its passage. Such an act does not divest any vested rights. Statutes have been sustained which correct or render immaterial defects in pending appeals vital under the

law in existence at the time of their allowance. Similar statutes have been upheld giving the appellate court jurisdiction of an appeal then pending, although no such jurisdiction existed when the appeal was taken.

In *Hepburn v. Curts*, 7 Watts (Pa.) 300, a statute was sustained and given application to a pending appeal, to the effect that "no action now pending on writ of error or otherwise, by partners or persons against partners or persons, shall abate or be defeated, by reason of one or more individuals being members of both firms."

In *Warton v. Cunningham*, 46 Ala. 590, a statute of 1870, curing a vital defect in the bill of exceptions on file in a case pending on appeal, is held to validate the appeal, although the bill of exceptions was filed and the appeal taken several months before the statute was passed.

The case of *Teel v. Chesapeake & Ohio Ry. Co.*, 204 Fed. 914, 123 C. C. A. 210, holds that where a necessary party defendant is omitted from a writ of error, the Circuit Court of Appeals is authorized by Sections 954 and 1005, Revised Statutes, and by the Court of Appeals Act of March 3, 1891, c. 517, 26 Stat. 829, allowing the unprejudicial amendment of certain defects in writs of error to the district courts, to permit an amendment of a writ of error inserting the name of the omitted party and bringing such party in by a new citation, even though the time for suing out a new writ had expired. The court states the law as follows (page 917):

"Such defects as this are generally curable by amendment of the writ of error and the issue of a new citation. Since the enactment of the first Judiciary Act of the United States, liberal statutory provisions have been maintained for curing defects of this character

wherever proceedings on error or appeal have been instituted in due time, though defectively, and could be remedied without causing injustice; and numerous illustrations may be found of a tendency in the courts to apply such legislation in the spirit in which it was evidently enacted. See Act of September 24, 1789, c. 20, Sec. 32, 1 Stat. 91, Rev. Stat. Sections 954, 1005 (U. S. Comp. St. 1901, pp. 696, 714); *Walton v. Marietta Chair Co.*, 157 U. S. 344, 346, 15 Sup. Ct. 626, 39 L. Ed. 725; *Knickerbocker Life Ins. Co. v. Pendleton*, *supra*; *Estes v. Trabue*, *supra*; *Thomas v. Green County*, 146 Fed. 970, 971, 77 C. C. A. 487 (C. C. A. 6th Cir.) affirmed in 211 U. S. 598, 601, 29 Sup. Ct. 168, 53 L. Ed. 343. In *Gilbert v Hopkins*, 198 Fed. 849, 117 C. C. A. 491 (C. C. A. 4th Cir.), a writ of error seasonably sued out was permitted to be amended by inserting the name of an omitted party, although the time fixed for suing out such a writ had then expired, and the new party was required to be brought in by a new citation.

The time for allowing a new writ of error has likewise expired in the instant case; but in view of the statutory provisions before alluded to, and of section 11 of the Court of Appeals Act (Act March 3, 1891, c. 517, 26 Stat. 829 U. S. Comp. St. 1901, pp. 552), we are disposed to enter a rule on the plaintiff in error to show cause, within ten days after the order is entered, why the Chesapeake & Ohio Railway Company of Kentucky should not be made a party defendant to her proceeding in error and for defendant in error so to show cause why the writ of error should not be permitted to be amended by inserting the name of that company and a new citation to be issued to it."

*Gilbert v. Hopkins*, 198 Fed., 849, 117 C. C. A., 491, referred to in the above excerpt, is to the same effect.

The case of *Freeborn v. Smith*, 2 Wall. 160, is in effect a controlling authority on the present motion. The plaintiff in that case had obtained a judgment against the defendant in



the Supreme Court of Nevada Territory. A writ of error was issued to this judgment from the Supreme Court of the United States and the record of the case was filed in this court. Thereafter, Nevada was admitted to the Union, the enabling act, however, making no provision for the disposal of cases then pending in this court on error or appeal from the territorial courts. This court had previously held, in a number of cases, that in such a situation, this court had lost all jurisdiction of and power to proceed with such pending cases. About one year after the admission of Nevada into the Union, and more than two years subsequent to the filing of the record of the case in this court, Congress passed the following statute:

“That all cases of appeal or writ of error heretofore prosecuted and now pending in the Supreme Court of the United States, upon any record from the Supreme Court of the Territory of Nevada, may be heard and determined by the Supreme Court of the United States; and the mandate of execution or of further proceedings shall be directed by the Supreme Court of the United States to the District Court of the United States for the District of Nevada, or to the Supreme Court of the State of Nevada, as the nature of said appeal or writ of error may require; and each of these courts shall be the successor of the Supreme Court of Nevada Territory as to all such cases, with full power to hear and determine the same, and to award mesne or final process thereon.”

A motion to dismiss had been filed in the case before the statute was passed, but the court, being advised that a bill was before Congress touching the matter, suspended action on the motion till it was seen what Congress might do. After the passage of the act, the motion to dismiss was renewed and was argued at great length by counsel for the defendant. The

argument in support of the motion is identical with that put forward by appellee in this case. Every contention as to the finality of judgments and vested rights and opening up of settled adjudications, made by counsel for appellee herein, was strongly urged upon the court in that case, as shown by the report. The court, however, was not impressed with the reasoning, and denied the motion to dismiss. In the following language the court strikingly disposes of the objections to the act (pages 173, 174, 175):

"It is objected to the act of 27th of February, just passed, that it is ineffectual for the purpose intended by it; that it is a retrospective act interfering directly with vested rights; that the result of maintaining it would be to disturb and impair judgments which, at the time of its passage, were final and absolute; that the powers of Congress are strictly legislative, and this is an exercise of judicial power, which Congress is not competent to exercise. But we are of opinion that these objections are not well founded. \* \* \* What good reason can be given why Congress should not remove the impediment which suspended the remedy in this case between two tribunals, neither of which could afford relief? What obstacle was in the way of legislation to supply the omission to make provision for such cases in the original act? If it comes within the category of retrospective legislation, as has been argued, we find nothing in the Constitution limiting the power of Congress to amend or correct omissions in previous acts. It is well settled that where there is no direct constitutional prohibition, a state may pass retrospective laws, such as, in their operation, may affect suits pending, and give a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings. \* \* \* If the judgment below was erroneous, the plaintiff in error had a moral right at least to have it set aside, and the defendant is only claiming a vested right in a wrong judgment. 'The truth is,' says Chief

Justice Farker, in *Foster v. Essex Bank*, 'there is no such thing as a vested right to do wrong, and the legislature which, in its acts, not expressly authorized by the Constitution, limits itself to correcting mistakes and to providing remedies for the furtherance of justice, cannot be charged with violating its duty, or exceeding its authority.' Such acts are of a remedial character, and are the peculiar subjects of legislation. They are not liable to the imputation of being assumptions of judicial power."

It is difficult to see why this case of *Freeborn v. Smith*, is not conclusive of the present question. The Supreme Court in that case had no jurisdiction of the appeal at the time of the passage of the Act. The case had, however, previously been taken to the Supreme Court, and, in a sense, was pending in that court when the Act was passed. Congress then says that all cases heretofore prosecuted on writ of error or appeal to and now pending in the Supreme Court, of which that court had no jurisdiction by reason of the omission of a saving clause in the Nevada enabling act, may be heard and determined in said court. In precisely the same manner, the Act of September 14, 1922, provides that cases theretofore appealed to and then pending in the Court of Appeals, as to which that court has no jurisdiction, shall not be dismissed, but shall be transferred to the Supreme Court. If the Act of September 14, 1922 had provided that the Court of Appeals should hear and determine such causes, instead of transferring them to this court, the statutes would be almost identical. As to the power of Congress to enact them, there is no possible distinction.

If Section 238-a might constitutionally have vested the Court of Appeals with jurisdiction of this case (as the

statute in *Freeborn v. Smith* conferred jurisdiction upon the Supreme Court), it is no objection to the Section that, instead, it directs a transfer of the case to this court. If the appeal is at all subject to the legislative power of Congress, Congress may vest jurisdiction in either court, at its discretion. Cases pending on appeal in one appellate court, may, without the violation of any constitutional guaranties, be, by statute, transferred to another appellate court for hearing and disposition.

*Duncan v. Missouri*, 152 U. S., 377, 14 S. Ct., 570;  
*Zellers v. Surety Co.*, 210 Mo., 86, 108 S. W., 548;  
*Branson v. Studebaker*, 138 Ind., 147, 33 N. E., 98.

3. The same principle as to the power of the legislature to legislate concerning pending controversies is applied in another line of similar cases.

It is well settled law that a statute, passed subsequent to the filing of a suit in a court which has no jurisdiction of the action in question, may vest that court with jurisdiction of the case, whether its lack of jurisdiction be as to the parties to the suit or as to the subject matter of the action. For example, a statute increasing the jurisdictional amount involved in suits which may be filed before a justice of the peace, may have the effect of vesting the justice with jurisdiction of cases filed before the act was passed, although no jurisdiction obtained in such cases prior to the act. Similarly, a jurisdictional requirement that the justice of the peace reside in the township in which the subject-matter of the action is located, or in which one of the parties re-

sides, may be abolished by statute, and thereby suits previously filed, which at the time were not cognizable by the justice, may be brought within his jurisdiction.

*Cunningham v. Dixon*, 15 Del., 163, 41 Atl., 519;  
*Mather v. Chapman*, 6 Conn., 54;  
*Muncie National Bank v. Miller*, 91 Ind., 441;  
*Walpole v. Elliott*, 18 Ind., 258;  
*Wilbourne v. Mann*, 81 So., 816 (Ala.)

## II.

It seems clear from the foregoing, that the appeal in this case was pending in the Court of Appeals when Section 238-a was enacted, and that therefore there is no constitutional objection to the application of the Act. Appellee's brief contains no suggestion that the Act cannot apply to pending appeals. Their whole argument is that *final* judgments cannot be affected by subsequent legislation.

1. On the contrary, the authorities are strong to the effect that it is within the power of Congress to make such a statute applicable even to cases wherein no appeal was pending when the statute was approved, and the time for appeal had expired.

It is well settled that litigants have no vested right in any particular remedy allowed by law for the enforcement of rights of action; and a remedy available when suit was filed or judgment obtained may be changed or abolished at the will of the legislature, provided only that a reasonably good remedy still remains or has been substituted for the

old. We believe that the Act of September 14, 1922, is a *remedial act*, that is, a statute affecting remedies merely, and that it could constitutionally be applied even to cases not pending on appeal at the time of its passage.

Appellee has, in the memorandum in support of the motion to dismiss, cited a number of cases to the effect that after a final judgment has been rendered, and the time then allowed by law for the taking of an appeal therefrom has expired, without an appeal having been taken, it is not competent for the legislature retroactively to extend the time for appeal and to allow a reconsideration of the case. With very few exceptions the cases referred to by appellee are decisions of state courts, arising under state statutes. They are entitled to little weight here, for the following reasons: (1) Many of the constitutions of the states in question expressly prohibit retroactive legislation; (2) The states are, by the federal constitution, denied the power to pass laws impairing the obligation of contracts, whereas there is no such prohibition on the power of Congress. Many state courts have held that a judgment is a contract within the meaning of that constitutional limitation.

None of the federal cases cited, with one exception, have any real bearing on the present controversy.

The decisions referred to on page 16 of appellee's brief are admittedly correct. The court cannot extend the statutory time within which an appeal must be taken and perfected. The following decisions, appearing on pages 17 and 18 of appellee's brief, are distinguishable: *Chase v. U. S.*, 222 Fed., 593; *Choat v. Trapp*, 224 U. S. 665; *Jones v. Mechan*, 175 U. S., 1; *In re Heff*, 197 U. S., 488; *Cherokee Nation v. Hitchcock*, 187 U. S., 294; *Wilson v. Wall*, 6 Wall.

89; *Reichert v. Felps*, 6 Wall., 160. They all involve the power of Congress to interfere with rights acquired under or vested by previously established treaties,—a question obviously of no application here. The cases of *U. S. v. Ry.*, 165 Fed., 742; *San Mateo Co. v. Ry.*, 13 Fed., 151, and *Murray v. Land Co.*, 18 How., 277, cited on page 18, have no bearing.

*Blair v. Miller*, 4 Dallas 21, merely holds that a writ of error, not returned at the proper term, is ineffective. In *State of Pa. v. Bridge Co.*, 18 How., 431, plaintiff brought a bill to have a bridge across the Ohio river removed, as an obstruction to navigation. A decree was entered as prayed. Thereafter Congress passed an act declaring the bridge to be a lawful structure. This act was held to supercede the effect of the decree. Such a decision certainly does not seem to support appellee's contention. The court does say that as a general proposition rights which have passed into judgment became absolute, but holds that this general rule does not apply in the case under consideration.

The case of *United States v. Aakervik*, 180 Fed., 137, is the only federal case cited by appellees which has any real bearing, and it would seem to be wrong, on principle; and there is a later decision to the contrary, arising under the very same statute involved in the Aakervik case,—the case of *United States v. Ellis*, 185 Fed., 546.

This court has, in a number of decisions, expressly sustained acts of Congress providing a new remedy by which judgments previously rendered and not pending on appeal, and as to which the time for appeal had expired, might be reopened.



The case of *The Protector*, 9 Wall., 687, is particularly apposite. There a decree had been rendered in the Federal Court for one of the southern states on April 5, 1861. An appeal therefrom was taken to the Supreme Court on July 28, 1869. The Judiciary Act at the time required appeals to be taken within 5 years. The court held that the same principle applies to the time for taking appeals as to the general statute of limitations and that the period of the war must be deducted from the time which had expired after the rendition of the decree. The appeal was therefore held proper. The appellee contended that the time for taking the appeal was limited to one year by the following Act of Congress, approved March 2, 1867 (14 Statutes at Large 545):

“Where any appeal or writ of error has been brought to the Supreme Court from any final judgment or decree of an inferior court of the United States for any judicial district in which, subsequently to the rendition of such judgment or decree, the regular sessions of such court have been suspended or interrupted by insurrection or rebellion, such appeal or writ of error shall be valid and effectual, *notwithstanding the time limited by law for bringing the same may have previously expired*; and in cases where no appeal or writ of error has been brought from any such judgment or decree, such appeal or writ of error may be brought within ONE YEAR from the passage of this act.”

The statute was not expressly applied, but the court clearly stated that the purpose and effect of the Act was to continue the right of appeal in cases where it had been lost. At page 690 of the opinion, the court speaks of the Act as follows:

“We are of opinion that this statute is an enabling and not a restraining one; that it was not intended to

take away any right of appeal, *but to continue the right in cases where it had been lost.* 'Where the common law and a statute differ,' says Blackstone, 'the common law gives place to the statute; and an old statute gives place to a new one. \* \* \* But this is to be understood only when the latter statute is couched in negative terms, or where its matter is so clearly repugnant that it necessarily implies a negative.' \* \* \* Such repugnancy does not exist here. *Many cases may be supposed, in which the right of appeal would be saved by the statute of 1867, which would not be saved by the act of 1789 and the operation of the common law rule followed in Hanger v. Abbott. If four years of the five elapsed before the war, the right of appeal would be saved by the act of 1867, but would be gone under the operation of the act of 1789, unless the appeal were brought before the passage of the former act.'*

The same statute was referred to in *United States v. Wiley*, 11 Wall., 508, which arose under an Act of Congress extending the time within which suits might be brought in states where, during the rebellion, the ordinary course of judicial proceedings had been interrupted. The following language appears in the opinion (page 514):

"The Act of March 2d, 1867, authorized appeals and writs of error from and to courts in judicial districts when the regular sessions of the courts had been suspended by insurrection or rebellion, if brought or sued out within one year from the passage of the Act. This Act might with more reason be claimed as raising an implication that such appeals or writs of error cannot be allowed after the expiration of a year from its passage. Yet in *The Protector* it was held that an appeal was in time though not taken until July 28th, 1869, more than eight years after the final decree in the Circuit Court, and more than two years after the enactment of 1867, and this because the four years of the war were to be deducted. In other words, the statute

being affirmative only, raised no implication of an intent to repeal a former statute or alter the common law to which it was not repugnant."

The Act of March 2, 1867, above referred to, goes much further, so far as the present question is concerned, than Section 238-a. It actually restores a right of appeal that had been lost; Section 238-a merely remedies a defect in a pending appeal. Yet the court did not seem even to question the validity of that Act.

An earlier case in this court, *Sampeyreac v. U. S.*, 7 Pet., 222, sustains the validity of an Act of Congress of May 8, 1830, which granted to the federal court in the Territory of Arkansas, power to proceed by bills of review, filed or to be filed, for the purpose of revising all or any decrees of said court, in cases wherein it shall appear that the jurisdiction of the same was assumed on any forged warrant, concession, grant, order of survey, or other evidence of title. The bill of review was filed shortly before the passage of the Act, to set aside a decree obtained in 1827. The lower court granted the relief prayed, and this court affirmed the decree. The decree of 1827 had become final before the passage of the Act, the one year period for appeal having expired; yet this court sustained the statute.

In *Calder v. Bull*, 3 Dallas, 386, and *Baltimore & Susquehanna R. R. v. Nesbit*, 10 How., 395, this court sustained the validity, so far as the federal constitution is concerned, of state statutes granting the right of a new trial in certain cases as to which the time for appeal had expired.

The following state decisions uphold statutes affording remedies by appeal or error or by way of new trial,

passed after the judgments in question had become final by the then existing law:

- Page v. Matthews*, 40 Ala., 547;  
*Noel's Heirs v. Noel's Adm.*, 40 Ala., 576;  
*Wheeler's Appeal*, 45 Conn., 306;  
*Calvert v. Williams*, 10 Md., 478;  
*Alword v. Little*, 16 Fla., 158;  
*Henderson & Nashville R. R. v. Dickenson*, 173 Mon. (Ky), 173;  
*Davis v. Ballard*, 1 J. J. Marshall (Ky), 563.

2. This court has held, in a number of cases, that a statute passed after the rendition of a judgment may grant a right of appeal therefrom, though no such right existed when the judgment was rendered. These cases are in point here. There is no difference in principle in extending a right of appeal after the same has expired and in granting such a right for the first time subsequent to the entry of a judgment not appealable.

- Mallett v. North Carolina*, 181 U. S. 589, 21 S. Ct. 730;  
*Stephens v. Cherokee Nation*, 174, U. S. 445, 19 S. Ct. 722;  
*Essex Public Road v. Skinkle*, 140 U. S. 334, 11 S. Ct. 790;  
*In re Claasen*, 140 U. S. 200, 11 S. Ct. 735;  
*Garrison v. New York*, 21 Wall. 196.

In the last case cited, at page 205 of the opinion, the court says:

"The objection to the act of 1871, that it impairs the vested rights of the plaintiff, and is therefore, repugnant

to the constitution of the State, is already disposed of by what we have said upon the first objection. There is no such vested right in a judgment, in the party in whose favor it is rendered, as to preclude its re-examination and vacation in the ordinary modes provided by law, even though an appeal from it may not be allowed."

In *Stephens v. Cherokee Nation*, 174 U. S. 445, 476-478, the appeals there considered were from decrees of the United States Court in the Indian Territory, rendered in cases pending therein, denying the right of various individuals to citizenship in certain Indian tribes. Under the law existing at the time of their rendition, appeals could be taken only to said United States Court, whose judgment was expressly made final by the statute. After the judgments had thus become final, by Act of July 1, 1898, Congress provided that there should be a right of appeal from the United States Court to the Supreme Court. The act by its terms was retroactive and was held to apply to the decrees. It was contended by appellees that it was not competent for Congress to provide for an appeal from the decrees of the United States Court in the Indian Territory after such decrees had been rendered and the term of court had expired, and especially as they were made final by the statute. In reply the Court said (p. 477):

"The contention is that the Act of July 1, 1898, in extending the remedy by appeal to this Court was invalid because retrospective, an invasion of the judicial domain and destructive of vested rights. By its terms the act was to operate retrospectively, and as to that it may be observed that while the general rule is that statutes should be so construed as to give them only prospective operation, yet where the language employed expresses a contrary intention in unequivocal terms, the mere fact that the legislation is retroactive does not necessarily render it void. \* \* \* *The grant of a new remedy by way*

of review has been often sustained under particular circumstances. *Calder v. Bull*, 3 Dallas, 386; *Sampereac v. United States*, 7 Peters, 222; *Freeborn v. Smith*, 2 Wall. 160; *Garrison v. New York*, 21 Wall, 196; *Freeland v. Williams*, 131 U. S. 405; *Essex Public Road Board v. Skinkle*, 140 U. S. 334. \* \* \* In its enactment Congress has not attempted to interfere in any way with the judicial department of the Government, nor can the act be properly regarded as destroying any vested right, since the right asserted to be vested is only the exemption of these judgments from review, and the mere expectation of a share in the public lands and moneys of these tribes if hereafter distributed, if the applicants [appellants] are admitted to citizenship, cannot be held to amount to such an absolute right of property that the original cause of action, which is citizenship or not, is placed by the judgment of the lower court beyond the power of re-examination by a higher court though subsequently authorized by general law to exercise jurisdiction." (Italics ours.)

3. The cases are uniform to the effect that a right of appeal, allowed by law at the time of the rendition of the judgment, may be taken away by a subsequent enactment. These decisions support the validity of Section 238a. A legal right to appeal from a judgment would seem to be quite as much of a vested right as a right to have the judgment remain unappealed from.

The following language was used by this court in *Railroad Co. v. Grant*, 98 U. S. 398:

"A party to a suit has no vested right to an appeal or writ of error from one court to another. Such a privilege once granted may be taken away, and if taken away, pending proceedings in the appellate court stop

just where the rescinding act finds them, unless special provision is made to the contrary."

Similary, in *Campbell v. Iron-Silver Mining Co.* 27 C. C. A. 646, 83 Fed. 643, the Circuit Court of Appeals for the Eighth Circuit, sustains the abolition of a right of appeal, allowed at the time of the judgment.

To like effect is *Lake Erie & W. R. Co. v. Watkins*, 157 Ind., 600, 62 N. E., 443.

The following cases are in accord with the foregoing statements of the law:

*Eastman v. Gurrey*, 14 Utah 169, 46 Pac. 828;  
*North Point Consol. Irr. Co. v. Utah & S. L. Canal Co.*, 14 Utah 155, 46 Pac. 824.  
*People v. Scott*, 52 Colo. 49, 120 Pac. 126;  
*Leavenworth Coal Co. v. Barber*, 47 Kan. 29;  
*Fellows v. McHaney*, 113 Ark. 363, 168 S. W. 1099.

The right to appeal may be abolished even after the court has allowed the appeal and the case is pending in the appellate court.

*Ex parte McCardle*, 7 Wall. 506;  
*U. S. v. Boisdore's Heirs*, 8 How. 113;  
*Gowen v. Busch*, 18 C. C. A. 572, 72 Fed. 299;  
*Nelson v. Perkins*, 86 Conn. 425, 85 At. 686.

These are certainly strong decisions. The statutes involved seem to take away quite as much of a vested right



as does a statute giving an additional right of appeal after the time therefor under the old law has expired. The rule should of course, apply both ways—that litigants have no vested right in any particular remedy or rule of procedure.

4. Very similar to statutes granting a right of review as to judgments already final and unappealable are acts abolishing as grounds for the dismissal of pending appeals, or as grounds for new trials, certain defects in procedure. Such acts are consistently upheld. For example, a statute to the effect that the failure of the trial judge to sign the bill of exceptions shall not entitle the appellee to a new trial, may be applied to a case pending on motion for new trial, although such a defect was fatal prior to the statute.

*Johnson v. Smith*, 78 Vt. 145, 62 Atl. 9.

In the latter case the court says:

“The procurement of a bill of exceptions, with a proper signature, for the consideration of this court, is one of the steps in the orderly progress of the case to its final determination. A statute which extends the means or opportunity of obtaining such a bill is remedial in its character and should be liberally construed. It extends, rather than restricts, the plaintiff’s rights. It affects the remedy only, it is not repugnant to the statute, and it does not disturb a vested right; for there is no such thing as a vested right in a particular procedure.”

The case of *Vallejo & U. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238, sustains, as applied to a pending appeal, a statute abolishing as a ground of reversal an improper admission or rejection of evidence, or a misdirection

of the jury, unless the upper court, after an examination of the entire record, deems that the error resulted in a miscarriage of justice. The court says:

"It has always been the desire and policy of this court to disregard unimportant and unsubstantial errors appearing in the record, and to reverse causes only for reasons affecting the merits of the case and the substantial rights of the parties. Our power to do this has hitherto been somewhat limited by the limitations upon our jurisdiction to consider the evidence. *San Jose Ranch Co. v. San Jose, etc., Co.*, 126 Cal. 324, 58 Pac. 824. *An important result of the aforesaid amendment is that it enlarges our jurisdiction in that particular.* \* \* \* This amended section is now in force and binding upon the Courts of Appeal. And as it effects the remedy only, it applies to pending appeals, although they may have been submitted prior to its adoption. A party has no contractual or vested right to have a judgment reversed because of an error which the court cannot say has produced what that section describes as a 'miscarriage of justice.' "

To much the same effect is the case of *Jacquins v. Commonwealth*, 9 Cush. 279, applying on appeal from a judgment rendered prior to its passage, the following statute:

"Whenever a final judgment in any criminal case shall be reversed by the supreme judicial court, upon a writ of error, on account of error in the sentence, the court may render such judgment therein as should have been rendered, or may remand the case for that purpose to the court before whom the conviction was had."

See also *Blonde v. Menominee Bay Shore Lumber Co.*, 106 Wis., 540, 82 N. W., 552.

5. The proposition that a person in whose favor a judgment is rendered has a vested right in the various incidents attached to the judgment by the law then in force, certainly cannot be maintained. Appellees' position seems to involve such a contention.

A statute abolishing imprisonment for debt may constitutionally restrict rights acquired and vested under a prior judgment.

*Pennimans case*, 103 U. S. 714.

Similarly, property subject to sale on execution in support of an existing final judgment, may be exempted from sale by subsequent enactment, with the result that the right of enforcement is materially affected.

*Myers v. Field*, 146 Ill. 50, 34 N. E. 424;

*Laird v. Carton*, 196 N. Y. 169, 89 N. E. 822;

*Brearley School v. Ward*, 201 N. Y. 358, 94 N. E. 1001;

*Leak v. Gay*, 107 N. C. 468, 12 S. E. 312;

*Haizlip v. Haizlip*, 240 Mo. 392, 144 S. W. 851;

*Balance v. Gordon*, 247 Mo. 119, 152 S. W. 358;

*Sears v. Seaboard Air Line Ry.* 3 Ga. App. 614, 60 S. E. 343.

A very important case is that of *Freeland v. Williams*, 131 U. S. 405. In that case plaintiff obtained judgment against defendant in a state court of West Virginia on December 22, 1865, for the taking and conversion of certain cattle. On writ of error to the Supreme Court of

Appeals of the State, the judgment was affirmed in July, 1867. On August 22, 1872, West Virginia adopted a new constitution, containing the following section:

"No citizen of this State who aided or participated in the late war between the government of the United States and a part of the people thereof, on either side, shall be liable in any proceeding, civil or criminal; nor shall his property be seized or sold under final process issued upon judgments or decrees heretofore rendered, or otherwise, because of any act done, according to the usages of civilized warfare, in the prosecution of said war, by either of the parties thereto. The legislature shall provide, by general law, for giving full force and effect to this section by due process of law."

Thereafter, the original defendant brought this bill in equity against the plaintiff, to perpetually restrain the enforcement of said judgment, on the ground that the cattle were taken during the rebellion, according to the usage of civilized warfare. The court gave a decree as prayed. An appeal therefrom having been denied, the case is, on error to this court, affirmed. The court says:

"The proposition of the plaintiff in error is, that by the judgment of the Circuit Court of Preston County he had acquired a vested right in that judgment; that the judgment was his property; and that any act of the State which prevents his enforcing that judgment, in the modes which the law permitted at the time it was recovered, is depriving him of property without due process of law, and, therefore, forbidden by the 14th Amendment of the Federal Constitution. This right of the plaintiff to enforce that judgment is insisted upon as a vested right with which no authority can lawfully interfere.

Prior to the adoption of the 14th Amendment the power to provide such remedies, although they may have interfered with what were called vested rights, seems to have been fully conceded. The cases in which this had been decided in this court are *Calder v. Bull*, 3 Dall. 386; *Satterlee v. Matthewson*, 2 Pet. 380; *Sampeyreac v. United States*, 7 Pet. 222; *Watson v. Mercer*, 8 Pet. 88; and *Freeborn v. Smith*, 2 Wall. 160. In the latter case, Mr. Justice Grier, when the Congress of the United States had allowed an appeal where the judgment would have otherwise been final, used this language: 'If the judgment below was erroneous, the plaintiff in error had a moral right at least to have it set aside, and the defendant is only claiming a vested right in a wrong judgment.' And he thus quotes the language of Chief Justice Parker, in *Foster v. Essex Bank*, 16 Mass. 245: 'The truth is there is no such thing as a vested right to do wrong; and a legislature, which, in its acts not expressly authorized by the constitution, limits itself to correcting mistakes, and to providing remedies for the furtherance of justice, cannot be charged with violating its duty, or exceeding its authority.'

Many other cases might be cited in which it was held that retroactive statutes, when not of a criminal character, though effecting the rights of parties in existence, are not forbidden by the Constitution of the United States."

The lien of a prior final judgment may be abrogated by statute.

- Snyder v. Brewing Co.*, 173 Ind. 659, 90 N. E. 314;
- Curry v. Landers*, 35 Ala., 280;
- Daily v. Burke*, 28 Ala., 328;
- U. S. v. Sturgis*, 14 Fed. 810.

The right to revive a judgment previously obtained may be abolished by statute, though such a right existed when the judgment was rendered.

*Bartol v. Eckert*, 50 Oh. St. 31, 33 N. E. 294;  
*Gaffney v. Jones*, 44 Wash., 158, 87 Pac. 114.

The time within which the lower court may, for certain causes, vacate the judgment, may be extended by subsequent statute, enacted after the expiration of the period formerly allowed.

*Marston v. Humes*, 3 Wash. 267, 28 Pac. 520.

The following is an excerpt from the opinion in the latter case:

"The said act amending section 109 did not go into effect until some 10 months after the rendition of the judgment in question, and it is contended by petitioners that, inasmuch as under said section 109, as it stood at the time of the rendition of their judgment, the relief thereunder was confined to five months, that at the expiration of that time their interest in said judgment became a vested one, so far as said section 109 is concerned; and that thereafter no amendment of said section could affect their rights. With this contention, however, I cannot agree. Their right in the judgment did not become vested until the court had lost all power to relieve against the same, whether under section 109 or any other provision of the Code; and not being vested, it was competent for the legislature to extend or change the time within which it could be attacked in the court where rendered by any legislation which it thought proper to effect such result."

The time for redemption from prior judgments may constitutionally be extended.

*Dunn v. Dewey*, 75 Minn., 153, 77 N. W. 793.

The right to interest on prior judgments, allowed by law at the time of their rendition, may be abolished by subsequent legislation.

*Morley v. Lake Shore, etc. Ry. Co.*, 146 U. S. 162, 13 S. Ct., 14;

*Read v. Mississippi County*, 69 Ark. 365, 63 S. W. 807, affirmed, 188 U. S. 739, 23 S. Ct. 849;

*Wyoming Nat. Bk. v. Brown*, 7 Wyo., 494, 53 Pac. 291.

6. The courts of last resort have sustained a great variety of retroactive statutes affecting, very materially, contract and property rights.

A statute abolishing the usury law may be taken as a typical example. A promissory note, unenforceable when made, because usurious, may be validated by a subsequent repeal of the usury statute. This court, in the leading case of *Ewell v. Daggs*, 108 U. S. 143, so states the law:

To the same effect are:

*Peterson v. Berry*, 125 Fed. 902;

*Coe v. Miller*, 77 So. 88 (Fla)

In like manner, contracts and deeds unenforceable (or even void) when entered into because of some failure



to comply with legal requirements, may be given validity by subsequent statutes changing or repealing the statutes in force at the time of their execution.

- Satterlee v. Matthewson*, 2 Pet. 380;  
*Walson v. Mercer*, 8 Peet. 88;  
*Randall v. Kreiger*, 23 Wall. 137;  
*Gross v. U. S. Mortgage Co.*, 108 U. S. 477;  
*West Side Belt Ry. v. Pittsburg Construction Co.*,  
 219 U. S. 92, 31 S. Ct., 196;  
*Jenkins v. Union Savings Assn.*, 132 Minn., 19,  
 155 N. W. 765;  
*Clark v. Dorr*, 156 Ind., 692, 60 N. E. 688;  
*Sullivan v. Ammons*, 95 Miss., 106, 48 So. 244.

The leading cases on the point are reviewed by the court in *West Side Belt Ry. v. Pittsburg Construction Co.*, 219 U. S. 92, 31 S. Ct., 196, to which reference is especially made.

Of like effect are curative statutes, validating defects in prior municipal bond elections. Such statutes are held to be constitutional, although, but for them, the bonds would be unenforceable. In *Camp v. State*, 71 Fla., 381, 72 So. 483, the court, in upholding such a statute, declines to follow the contention that it divests vested rights.

This court in *Utter v. Franklin*, 172 U. S. 416, 19 S. Ct. 183, sustained the constitutionality of a subsequent statute curing defects in a municipal bond issue, although prior to the passage of the act the bonds had been adjudged void by this court.

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A void marriage may be rendered valid by a statute subsequently enacted, even though vested property rights are thereby affected.

*Goshen v. Stonington*, 4 Conn., 209.

An unlicensed physician, unable to recover the value of the services rendered by him, by the law in force at the time of their performance, may acquire such a right by a change in the law.

*Hewitt v. Wilcox*, 1 Metc. (Mass) 154.

An occupying claimant statute, giving to occupying claimants the right of reimbursement for improvements made on the land, may be applied retroactively with respect to improvements as to which no such right previously existed.

*Claypoole v. King*, 21 Kan., 602.

The following decisions uphold similar types of retroactive statutes affecting property interests:

*Independent School Dist. v. Smith*, 181 N. W. 1  
(Ia.)

*Scales v. Otts*, 127 Ala., 582, 29 So. 63;

*Royston v. Miller*, 76 Fed. 50;

*Boss v. Roanoke Navigation Co.*, 111 N. C. 439,  
16 S. E. 402.

In *Legal Tender Cases*, 110 U. S. 421, an Act of Congress making United States treasury notes legal tender for the payment of private debts is held to be constitutional, as to debts incurred both before and after its passage.

The case of *Foster v. Essex Bank*, 16 Mass., 245, is a leading case with respect to the validity of a statute which continued certain corporations in existence for a period of three years after their charters would otherwise have expired, for the purpose of suing and being sued. It was ably argued that such a statute was invalid, as an impairment of vested rights, but the court upheld the Act. The court, at page 273 of the opinion, says:

"Many statutes have been referred to in the argument, which are much more questionable, as to their constitutionality, than the one under consideration. The statutes of limitation, operating upon contracts already in force:—The suspension of those statutes, after the debtor may have considered that he had a right to be discharged within a certain period:—The statutes made for curing defects in the proceedings of courts, towns, officers, etc., when the party to be affected might be said to have a vested right to take advantage of the error. The truth is, there is no such thing as a vested right to do wrong; and a legislature, which, in its acts not expressly authorized by the constitution, limits itself to correcting mistakes, and to providing remedies for the furtherance of justice, cannot be charged with violating its duty, or exceeding its authority."

The same court, in *Converse v. Ayres*, 197 Mass., 443, 84 N. E. 98, in sustaining a statute giving judgment cred-

itors of corporations greater rights as against stockholders, says:

"It thus being obvious that as the law stood, while resident stockholders could be made to respond, foreign stockholders escaped, further legislation was enacted to supplement existing statutes, by providing a form of procedure which would remove the jurisdictional difficulty."

A statute very similar to the one involved in the above case was upheld in *Moore v. Riply*, 106 Ga., 556, 32 S. E. 647.

7. It is well established that a statute cutting down the period of a prior statute of limitations may apply to existing rights of action.

*Terry v. Anderson*, 95 U. S. 628;

*Koshonong v. Burton*, 104 U. S. 668;

*Wheeler v. Jackson*, 137 U. S. 245.

Furthermore, it is the established law in this court, and in many state tribunals, that an act is valid which removes the bar of a statute of limitations the period of which has expired. *Campbell v. Holt*, 115 U. S. 620, is the leading case on the point. The reasoning of the court is as follows:

"It is much insisted that this right to defence is a vested right, and a right of property which is protected by the provisions of the Fourteenth Amendment.

It is to be observed that the word vested right is nowhere used in the Constitution, neither in the original instrument nor in any of the amendments to it.

We understand very well what is meant by a vested right to real estate, to personal property, or to incorporate hereditaments. But when he got beyond this although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the Constitution.

We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right, so as to be beyond legislative power in a proper case. The statutes of limitation, as often asserted and especially by this court, are founded in public needs and public policy—are arbitrary enactments by the law-making power. *Tioga Railroad v. Blossburg and Corning Railroad*, 20 Wall. 137, 150. And other statutes, shortening the period or making it longer, which is necessary to its operation, have always been held to be within the legislative power until the bar is complete. The right does not enter into or become a part of the contract. No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore, when the legislature says, time shall be no bar, though such was the law when the contract was made. The authorities we have cited, especially in this court, show that no right is destroyed when the law restores a remedy which had been lost."

There was a similar holding by this court in *Stewart v. Kahn*, 11 Wall. 493, with respect to the Act of June 11, 1864, suspending the running of the statute of limitations during the Civil War. The court says:

"A severe and literal construction of the language employed might conduct us to the conclusion, as has been insisted in another case before us, that this clause was intended to be made wholly prospective as to the period to be deducted, and that it has no application where the action was barred at the time

of its passage. Such, we are satisfied, was not the intention of Congress. A case may be within the meaning of a statute and not within its letter, and within its letter and not within its meaning. The intention of the law-maker constitutes the law. The statute is a remedial one and should be construed liberally to carry out the wise and salutary purpose of its enactment. The construction contended for would deny all relief to the inhabitants of the loyal States having causes of action against parties in the rebel States if the prescription had matured when the statute took effect, although the occlusion of the courts there to such parties might have been complete from the beginning of the war down to that time. The same remarks would apply to crimes of every grade if the offenders were calleed to account under like circumstances. It is not to be supposed that Congress intended such results. There is no prohibition in the Constitution against retrospective legislature of this character. We are of the opinion that the meaning of the statute is that the time which elapsed while the plaintiff could not prosecute his suit, by reason of the rebellion, whether before of after the passage of the act, is to be deducted. Considering the evils which existed, the remedy prescribed, the object to be accomplished, and the considerations by which the law-makers were governed lights which every court must hold up for its guidance when seeking the meaning of a statute which requires construction—we cannot doubt the soundness of the conclusion at which we have arrived.”

The Federal Transportation Act of February 28, 1920, paragraph f, of section 206, provides:

“The period of federal control shall not be computed as a part of the period of limitation in actions against carriers or in claims for reparation to the commission for causes of action arising prior to federal control.”

In *Standley v. United States Railroad Administration* (D. C. Ohio), 271 Fed. 794, it was held that the above provision was applicable to a cause of action which was fully barred under the law as it stood in Ohio before the approval of the Transportation Act. The court, said (p. 795):

"This language applies to plaintiff's cause of action, and admits of no other interpretation than that the period of federal control is not to be taken into account in computing the period of time within which causes of action are barred by statutes of limitation. . . . Nor can any question be properly made respecting the power of Congress to enact this legislation. Plaintiff's action, it is true, was barred February 28, 1920, when this act was approved; but there is no constitutional prohibition forbidding the removal of the bar of the statutes of limitations against causes of action based upon debts, claims, or personal demands, even though the bar has already attached when the act is passed. *Campbell v. Holt*, 115 U. S., 620; 12 Corpus Juris, p. 780, Section 576."

A like conclusion with respect to the same federal statute was reached in *Wenatchee Produce Co. v. Great Northern Ry. Co.* (D. C. Wash.) 271 Fed. 784.

The following state decisions, among others, are to the same effect:

*Danforth v. Groton Water Co.*, 178 Mass. 472, 59 N. E. 1033;

*Jackson Hill Coal & Coke Co. v. Board of Commissioners* 181 Ind. 335, 104 N. E. 497.



In *Hinton v. Hinton*, 61 N. C. (1 Phil. L. ) 410, it was held that a statute giving a widow six months in which to dissent from the provision of a will and elect to take dower as at common law, does not confer a right of dower, but is a statute of limitations upon that right, and therefore that a later statute extending the time for such dissent, is constitutional, and applies to a case barred before its passage.

8. The foregoing decisions, cited under subdivision II of this memorandum, seems to establish a proposition of law which should be conclusive of this controversy. That proposition is variously stated in the cases. It appears in the following forms, among others: "There is no such thing as a vested right to do wrong;" "There is no vested right to defeat a just debt;" "A vested right is one of which a person cannot be deprived without injustice;" "A party has no vested right in a defense based upon an informality not affecting his substantial equities;" "There is no vested right in a remedy or rule of procedure;" "The theory of vested rights does not prevent the curing of mere irregularities." None of these formulae can be applied, in a rule of thumb fashion, to a particular statute, as a definite unanswerable test of constitutionality. Certain difficulties of application are inherent in them all. At the basis of them all, however, there is a real principle of law. Justice Holmes, then Chief Justice of the Supreme Judicial Court of Massachusetts, in the case of *Danforth v. Groton Water Co.*, 178 Mass., 472, 59 N. E. 1033, summarized the cases, and the rule established by them, as follows:

"But however that may be, multitudes of cases have recognized the power of the legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice, and if the obstacle in the way of the creation seemed small."

The decision in *Danforth v. Groton Water Company* is so precisely in point here that the entire opinion may be referred to as supporting the position of appellants *in toto*. Justice Holmes has rightly deducted from the cases the real principle at their basis. Under that principle, the power of Congress to enact Section 238-a of the Judicial Code really depends upon the equity, or moral worth, or substantial justice of such legislation as set over against the moral worth or value of the right which the statute takes away.

There is little substantial moral worth in the right which appellees are asserting. If the judgment below be a proper one, appellees will not be injured by a further review of the case. If that judgment is wrong and should be reversed, no equitable right is denied by rehearing and reversal.

On the other hand there are very strong equities in favor of the statute. The language of Chief Justice Taft quoted at the beginning of this brief characterizes as a "trap" the condition existing before the enactment of the statute. The contention of appellees is that while Congress may properly provide relief for appellants who have not yet fallen into the "trap" no help can be extended to an unfortunate victim already entrapped. Certainly every in-

tendment should be made in favor of a statute intended to prevent a miscarriage of justice in a matter of simple appellate procedure.

A very able article by the Hon. Charles W. Bunn, of St. Paul, Minnesota, with respect to the appellate jurisdiction of this court, appearing in the Harvard Law Review for June, 1922, at page 902 begins as follows:

"The jurisdiction of the Supreme Court of the United States to review judgments of the District Court and Circuit Court of Appeals should be easy to determine and free from doubt. In many cases it is far from that."

The court should not make litigants suffer from this ambiguity in the statutes in the absence of a clearly compelling consideration. There is certainly no justice in penalizing the appellant to the extent of the loss of his entire cause of action, because his attorney cannot determine from the prior decisions of this court whether the appeal should be brought here or go to the Court of Appeals.

9. Much is made by appellees of the fact that the appeal to the Circuit Court of Appeals was not taken until after the expiration of the three months' period for an appeal to the Supreme Court. There is nothing whatever in this point. If, as contended by appellees, the appeal to the Court of Appeals was a nullity, then it could have made no difference that such appeal was attempted prior to the expiration of the three months rather than thereafter. In either event, under the contention, there would have been no *real* appeal, and hence the judgment would have been unappealed from during the allowed time. The time

of the appeal to the Court of Appeals is entirely immaterial.

This court has already sustained the validity of section 238-a as applied to a pending appeal to the wrong court in a criminal case, in *Heitler v. United States*, 43 Sup. Ct. 185. This decision seems to be a direct authority for denying the motion to dismiss herein. Chief Justice Taft, rendering the opinion of the court in that case, says of Section 238-a:

“This is a remedial statute and should be construed liberally to carry out the evident purpose of Congress.”

The judgment below in that case was entered more than sixteen months before the approval of Section 238-a, yet the court applies the section and transfers the case to the proper court.

### III.

The sole basis for the motion to dismiss is the claim that Section 238-a is unconstitutional as applied to the present appeal. The determination of this question in favor of appellee would dispose of the appeal without an opportunity for a hearing on the merits. This is the situation in both the *Abernathy* and *Hagerman* cases pending here. The third case, involving identical questions on the merits, was retained by the Court of Appeals because of a diversity of citizenship which did not appear in the *Abernathy* and *Hagerman* cases. It has been argued in that court, and will without doubt come to this court after decision there.

In view of the gravity of the constitutional question and of the recognized policy of this court not lightly to set aside acts of Congress, we respectfully request an opportunity to argue orally the motion to dismiss, and also the motion to remand, by special assignment, or if that be impossible, then at the argument on the merits. If our position can be made clear to the court, we believe there can be no question but that jurisdiction will be retained.

Respectfully submitted,

JUSTIN D. BOWERSOCK,

ARTHUR MILLER,

SAM'L J. McCULLOCH,

FRANK P. BARKER,

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Supreme Court of the State of Kansas

OCTOBER TERM, 1922

MILLAN CONTRACTING COMPANY, A CORPORATION, AND FIRST CITY NATIONAL BANK AND TRUST COMPANY OF KANSAS CITY, A CORPORATION, APPELLANTS,

VS.

R. HAYWOOD HAGERMAN, APPELLEE.

APPEALS FROM THE DISTRICT COURT OF THE STATE OF KANSAS.

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**No. 737.**

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**IN THE  
Supreme Court of the United States**

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OCTOBER TERM, 1922.

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McMILLAN CONTRACTING COMPANY, A CORPORATION, AND FIDELITY NATIONAL BANK AND TRUST COMPANY OF KANSAS CITY, A CORPORATION, APPELLANTS,

VS.

B. HAYWOOD HAGERMAN, APPELLEE.

---

**APPELLEE'S MOTION TO DISMISS APPEAL.**

B. Haywood Hagerman, the above appellee appearing especially for the purpose of this motion only and for no other purpose, and without an intention of appearing generally and without intention to waive the question of the jurisdiction of this Honorable Court, comes now and moves the court to dismiss the appeal of McMillan Contracting Company, a corporation, and Fidelity National Bank & Trust Company of Kansas City, a corporation, appellants, herein and as grounds for the said motion assigns the following, to-wit:

1. This is a suit in equity instituted in the District Court of the United States for the Western Division of the Western District of Missouri for the sole and only purpose of having certain alleged special taxes upon the land of the complainant in Kansas City, Missouri, purporting to have been levied under the laws of the State of Missouri, adjudicated and declared illegal, null and void, because the enforcement of such alleged special taxes would deprive the complainant below (appellee here) of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. A copy of the amended bill of complaint under which said suit was tried is included in the transcript of the said cause heretofore filed in this court to which reference is hereby made.

2. The jurisdiction of the said United States District Court in said cause rested solely and only upon an attack by appellee (complainant below) upon a state statute and the provisions of the charter of Kansas City; because of their alleged violation of, and their alleged conflict with, the Fourteenth Amendment of the Constitution of the United States.

3. That on the 7th day of July, 1921, the aforesaid District Court of the United States rendered and entered of record, a final judgment and decree in favor of this appellee (complainant below) adjudging said alleged special taxes upon the property of the appellee (complainant below) to be null and void, as being issued contrary to and in violation of the provisions of the Con-

stitution of the United States, particularly the Fourteenth Amendment thereof.

4. That thereafter, and on January 4th, 1922, the appellants, McMillan Contracting Company, a corporation and Fidelity National Bank & Trust Company, a corporation, filed a petition for appeal from said final judgment to the United States Circuit Court of Appeals in and for the Eighth Circuit; and the said District Court on the said 4th day of January, 1922, contrary to the statute fixing time for allowing appeals made and entered of record, an order allowing said appeal to said United States Circuit Court of Appeals.

5. That thereafter there was filed in said United States Circuit Court of Appeals in this cause, by this appellee, a motion to dismiss said purported appeal for want of jurisdiction; and thereafter the said United States Circuit Court of Appeals did, by order, transfer the said purported appeal to this court, as the court in which said purported appeal was returnable, if taken in time.

6. That by virtue of the facts as herein stated and as shown by the transcript of said cause now filed in this court, this court did not and could not, acquire jurisdiction over said cause by virtue of the said attempted appeal.

Wherefore, the appellee prays this Honorable Court to make an order dismissing said purported appeal.

ALBERT S. MARLEY,

*Attorney for Appellee.*

No. 737.

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IN THE

# Supreme Court of the United States

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OCTOBER TERM, 1922.

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McMILLAN CONTRACTING COMPANY, A CORPORATION, AND FIDELITY NATIONAL BANK AND TRUST COMPANY OF KANSAS CITY, A CORPORATION, APPELLANTS,

VS.

B. HAYWOOD HAGERMAN, APPELLEE.

---

## **MEMORANDUM IN SUPPORT OF APPELLEE'S MOTION TO DISMISS APPEAL.**

The jurisdiction of the United States District Court in and for the Western Division of the Western District of Missouri in this cause, rested solely upon the alleged violation of the Constitution of the United States, more particularly the fourteenth amendment thereof, in the levying of special taxes under the laws of the State of Missouri upon the property of the complainant in Kansas City, in said state.

Paragraph 3 of the amended bill of complainant upon which this decree was based alleges the following:

"That the controversy herein arises under and involves the construction of the Constitution of the United States and particularly the Fourteenth Amendment of said Constitution as hereinafter specifically shown."

And paragraphs 13 and 14 of the said first amended bill of complaint alleges:

13. That said Ordinance No. 21831, and said assessment attempted to be made against said property of said complainant, and said tax bills attempted to be issued against said property of complainant, were and are unconstitutional null and void, for the reason that they and each of them if enforced, will deprive complainant of his property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that the said property although located a great distance from said boulevard, is, pursuant to said ordinance and said assessments, sought to be charged with the same benefits, and in the same proportion as property immediately abutting upon said boulevard, and which is necessarily specially benefited greatly in excess of all property which does not adjoin and abut upon said boulevard, and especially property located as that of complainant at a great distance from said boulevard, thereby depriving complainant of the equal protection of the law in violation of Section 1 of Fourteenth Amendment to the Constitution of the United States in that said Section 28 of Article VIII, and said ordinance, and said proceedings hereinabove referred to, do not, and did not, provide, give or grant to this complainant, or his predecessor in title, any opportunity to be heard as to the apportionment of the benefits resulting from the cost of said grading among the various tracts of property in the benefit district, and com-

plainant's predecessor in title and complainant had no notice or opportunity to be heard in relation to the value at which their property was assessed by the city assessor, nor as to the amount of benefits, if any, accruing to it, by reason of said improvements, but that said section of said Charter and said Ordinance provide for an arbitrary and unfair and discriminating method of apportionment as hereinbefore shown, all of which is violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States as hereinabove set forth, and for the further reason that no suit or proceeding was instituted in the Circuit Court against the respective owners of the land to be charged with the cost of said work or against this complainant, as required by said charter and by said ordinance, as aforesaid.

14. Complainant further states that the pretended benefit district described in and fixed by said Ordinance of Kansas City Mo., 21831, was unreasonable, discriminating, arbitrary and unjust, and was such as to place an unconscionable burden and inequitable proportion of the cost of said work upon the land of complainant; a large amount of land, including the said tract of complainant, lying a long distance north of and not abutting or nearly approaching said Meyer Boulevard, and not especially benefited by the grading of Meyer Boulevard, was included within said benefit district while a large amount of land east and south of said Meyer Boulevard particularly and peculiarly and obviously benefited by the grading of said Meyer Boulevard, was left wholly out of said benefit district and was not assessed at all for such grading. Complainant further states that the benefit district described in said Ordinance No. 21831, was limited and confined to a relatively small territory, thereby fixing the improvement of Meyer Boulevard in question as one of a purely local nature and

benefit, while, as a matter of fact, the improvement was not of a local nature but was designated to be and is of a general nature and for the general public benefit, as aforesaid: Said Meyer Boulevard is not, in fact, a street or boulevard, but is, in fact, a great and broad parkway varying from two hundred twenty (220) to five hundred (500) feet in width and it is not appropriate, necessary or useful to nor a peculiar local benefit to the lands abutting on it or adjacent thereto, or to the lands in said benefit district, the same being unimproved, unplatted suburban lands, as aforesaid. And, although said Meyer parkway is primarily and obviously a benefit to said Swope Park, and to the general public, neither said park lands were assessed anything toward the cost of said grading, although said park lands might, under the charter of Kansas City, have legally been so assessed, nor did the city or general public otherwise contribute or pay any part of the cost of said grading, although such is contemplated by the Charter of Kansas City."

The learned chancellor, in a memorandum opinion, stated, among other things, the contention of complainants. In his statement of such contentions the learned chancellor says:

"Many points are urged by the complainants against the regularity of the proceedings and the validity of the tax bills. It is claimed that the method of apportionment provided for in Section 28 of Article 8 of the Charter is fundamentally so unfair and unjust as to result in the taking of property without due process in violation of the Fourteenth Amendment of the Federal Constitution; that the tax assessed against the property in question exceeds special benefits received to



such an extent as to result in the taking of the property without due process; that this is a general public improvement and not a local one; that the benefit district is unreasonable; that the Circuit Court proceedings is an essential step in the grading procedure and was not followed with sufficient strictness in that, a suit was not brought in the name of Kansas City and that the parties charged were not named; that that proceeding was in fact, a moot one without recognition in the judicial procedure of the state, binds no one and that the decree entered cannot be urged as *res adjudicata*; they also claim that the benefits were not apportioned equitably and with due regard for actual benefits \* \* \* but the assessed valuation of the property in the benefit district for general tax purposes aggregates no more than the cost of this grading; this would never do, because such an assessment would be obvious confiscation, not of a single isolated lot, but of the entire benefit district; therefore an arbitrary assessment was made, presumably with the assistance of the same assessor who makes the assessment for general tax purposes, amounting, as we have seen, to nearly five times the normal assessed valuation \* \* \* I find for the reasons stated as disclosed by the record, that both the benefit district and the assessment were arbitrary and unreasonable and that the tax bills unreasonably, exceed any possible benefit to this restricted benefit district.

And in the same opinion, the said learned chancellor further says that the "relief prayed by the petitioners will be granted and decrees to that effect may be prepared and entered."

In conformity with the said opinion of the learned chancellor, he did, on the 7th day of July, 1921, sign,

file and enter of record, a final decree granting the relief prayed for pursuant to his memorandum opinion.

On the 4th day of January, 1922, the appellants herein, applied for and were allowed, an appeal in this cause to the United States Circuit Court of Appeals for the Eighth Circuit and on the same day filed in this cause, their assignment of errors, assigning among things, the following errors:

"The court erred in ruling that the benefit district was arbitrary and unreasonable."

"The court erred in ruling that the assessment was arbitrary and unreasonable."

"The court erred in holding that the tax bills involved in this action exceeded the special benefits received by the lands in question."

"The court erred in holding that the tax bills unreasonably exceeded the benefit or any possible benefit to the lands in question."

"The court erred in holding that the improvement in question was in its nature a general public improvement rather than a local improvement."

"The court erred in holding that the method of apportionment within the benefit district was arbitrary and unreasonable."

"The court erred in decreeing that the tax bills were null and void and that the land in question be released from said tax bills."

"11. The court erred in holding the amounts of the tax bills in question to be unreasonable or confiscatory for the reason that there was no competent evidence as to the values of the lands in controversy."

Upon the filing of the transcript of record in this cause in the United States Circuit Court of Appeals for the Eighth Circuit, the appellee herein, did file his

motion to dismiss the said purported appeal for want of jurisdiction in the said Circuit Court of Appeals; and the said Circuit Court of Appeals did, thereupon order the transcript of the record in this cause to be certified to this court, holding in a *per curiam* opinion that the United States Circuit Court of Appeals has no jurisdiction and also holding as follows (284 Fed. Rep. 354):

"Our attention has been called to the Act of Congress approved September 14, 1922, adding Section 238a to the Judicial Code, which reads as follows:

'If an appeal of writ of error has been or shall be taken to, or issued out of, any Circuit Court of Appeals in a case wherein such appeal or writ of error should have been taken to or issued out of the Supreme Court, or if an appeal or writ of error has been or shall be taken to, or issued out of, the Supreme Court in a case wherein such appeal or writ of error should have been taken to, or issued out of, a Circuit Court of Appeals, such appeal or writ of error shall not for such reason be dismissed, but shall be transferred to the proper court, which shall thereupon be possessed of the same and shall proceed to the determination thereof, with the same force and effect as if such appeal or writ of error had been duly taken to or issued out of, the court to which it is so transferred.'

"Appellees claim that no transfer of these cases to the Supreme Court should be ordered under this statute, because the appeals were not applied for within three months, after the entry of the decree (Sec. 6, Ch. 448, 39 Stats. 726) and therefore that the Supreme Court would have no jurisdiction to entertain the appeal. This is a question that is more properly determined by the court whose authority is questioned. An order will be entered

transferring the appeals in cases numbered 6134 and 6135 to the Supreme Court of the United States."

Filed October 23, 1922.

Section 238 of the Judicial Code (Sect. 1215 compiled statutes 1918) fixed the appellate jurisdiction of the United States Supreme Court in the following language:

*"Appeals and writs of error from United States District Courts.* Appeals and writs of error may be taken from the District Courts, including the United States District Court for Hawaii and the United States District Court for Porto Rico, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case, the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States (J. C. 238; Acts March 3, 1891, c. 517, 5, 26 Stat. 827; Jan. 20, 1897, c. 68, 29 Stat. 492; Apr. 12, 1900, c. 191, 35, 31 Stat. 85; April 30, 1900, c. 339, 86, 31 Stat. 158; March 3, 1909, c. 269, 1, 35 Stat. 838; March 3, 1911, c. 231, 238, 244, 36 Stat. 1157; Jan. 28, 1915, c. 22, 2, 38 Stat. 804.)

And the Acts of Congress approved Sept. 6th, 1916, fixes the time in which appeals to the Supreme Court

shall be allowed or writs of error granted, to three months and prohibits the granting of an appeal or the allowing of a writ of error at any time beyond three months, using the following language:

*"Time for application for writ of error, appeal or certiorari: No writ of error, appeal, or writ of certiorari intended to bring up any cause for review by the Supreme Court shall be allowed or entertained unless duly applied for within three months after entry of the judgment or decree complained of: Provided, that writs of certiorari addressed to the Supreme Court of the Philippine Islands may be granted if application therefor be made within six months (Act Sept. 6, 1916, c. 448, 6, 39 Stat. 727).*

It clearly appears from the record on file in this court, that the sole and only ground of jurisdiction of the Federal Trial Court was that a Federal constitutional question, was directly involved; and for that reason, the United States Supreme Court was and is the only court having appellate jurisdiction.

In support of this proposition we desire to call the court's attention to the following authorities:

- L. & N. R. R. v. Greene*, 244 U. S. 527.
- Lemke v. Farmers Grain Co.*, 42 U. S. S. C. R. 244 (decided Feb. 27th, 1922).
- Raton Water Works Co. v. City of Raton*, 249 U. S. 252.
- South Carolina Glass Co. v. South Carolina*, 240 U. S. 318.
- Union & Planters Bank v. Memphis*, 189 U. S. 71.

*City of New York v. Gas Company*, 253 U. S. 219.

*Vicksburg v. Water Works Co.*, 202 U. S. 453.

*443 Cases of Eggs v. U. S.*, 226 U. S. 172.

*Siler v. L. & N. R. R.*, 213 U. S. 192.

*Amer. Sugar Refin. Co.*, 181 U. S. 277.

*Huguley Mfg. Co. v. Cotton Mills*, 184 U. S. 290.

*Brolen v. U. S.*, 236 U. S. 216.

*Sugaman v. U. S.*, 249 U. S. 189.

In *Lemke v. Farmers Grain Company*, 42 U. S. S. C. R. 245, decided Feb. 27th, 1922, this court says:

"At the threshold we are met with a question of the jurisdiction of the Circuit Court of Appeals to review the decree of the District Court: It is well settled that when the jurisdiction of the District Court rests solely upon an attack upon a state statute because of its alleged violation of the Federal Constitution, a direct appeal to this court is the only method of review. Section 238, Judicial Code (Comp. St. Sec. 1215). *Carolina Glass Co. v. South Carolina*, 240 U. S. 305, 36 Sup. Ct. 293, 60 L. Ed. 658, and cases cited."

and in *Raton Water Works Company v. City of Raton*, 249 U. S. 552, the memorandum opinion by The Chief Justice is not lengthy and is as follows:

"The certificate states that in a cause pending before it on appeal from the District Court, the jurisdiction of the court below to entertain the cause on appeal was questioned on the ground that the judgment of the District Court was exclusively susceptible of being reviewed by direct appeal to his court: The certificate further states that the parties to the cause in the District Court were both

corporations of New Mexico and the jurisdiction of the District Court to entertain the suit was based solely upon the ground that it was one arising under the Constitution of the United States.

Resulting from these conditions the question which the certificate propounds is this: 'Has this court (the Circuit Court of Appeals) jurisdiction of the appeal?' The solution of the question is free from difficulty, since whatever at one time may have been the basis for hesitancy concerning the question, the necessity for a negative answer is now conclusively manifest as the result of a line of decisions determining that, under the circumstances as stated, the Circuit Court of Appeals was without jurisdiction of the appeal, as the exclusive power to review was vested in this court. Judicial Code Secs. 128, 238; *American Sugar Refining Co. v. New Orleans*, 181 U. S. 277-281; *Huguley Manufacturing Company v. Galeton, Cotton Mills*, 184 U. S. 290, 295; *Union & Planters Bank v. Memphis*, 189, U. S. 71, 73; *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 458; *Caroline Glass Co. v. South Carolina*, 240 U. S. 305, 318.

A negative answer to the question propounded is therefore directed.

And it is so ordered."

So also in *Carolina Glass Co. v. South Carolina*, 240 U. S. 1 c. 318, the Supreme Court says:

"This writ brings up a judgment rendered by the Circuit Court of Appeals, fourth circuit, affirming the same final judgment of the District Court considered in No. 205 *supra*. 206 Fed. Rep. 635. There is no allegation of diverse citizenship and the trial court's jurisdiction was invoked solely upon the ground that the controversy involved application of the Federal Constitution.

In such circumstances the Circuit Court of Appeals is without jurisdiction to review, *Union & Planters Bank v. Memphis*, 189, U. S. 71, 93. Its judgment is accordingly reversed and the cause remanded with directions to dismiss the writ of error improperly entertained."

In *Union & Planters Bank v. Memphis*, 189 U. S. 71, the Supreme Court through Mr. Chief Justice Fuller says on page 73:

"Diversity of citizenship did not exist, and the jurisdiction of the Circuit Court rested solely on the ground that the cause of action arose under the Constitution of the United States. The appeal lay directly to this court under section five of the Judiciary Act of March 3rd, 1891, and not to the Circuit Court of Appeals. *American Sugar Refining Company v. New Orleans*, 181 U. S. 277."

To the same effect is *American Sugar Refining Company v. New Orleans*, 181 U. S. 277.

As clearly appears by Section 1228-a of the Judicial Code, Congress has forbidden the issuance of writ of error or writ of certiorari or the allowance of an appeal intended to bring up to this court for review the action of a trial court, unless such writ or appeal is applied for within three months after the entry of the judgment or decree complained of.

The record shows that the decree was entered on July 7th, 1921, so that after the 7th day of October, 1921, the decree in this case became final and the appellee at once became possessed of a vested right in and to the decree granting him the relief asked for in his bill



of complaint. The record also shows that the application for an appeal was made on January 4th, 1922, long after the right of appeal had been lost; and even then it was asked and allowed to the United States Circuit Court of Appeals, which had no jurisdiction in any event.

The appellee contends that the statutory time in which an appeal must be taken and perfected is jurisdictional and cannot be extended by the court and in support of that contention he calls this Honorable Court's attention to the following authorities:

*Old Nick Williams Co. v. U. S.*, 215 U. S. 541.

*London Credit Co. v. R. R.*, 128 U. S. 258.

*Conroy v. Bank*, 203 U. S. 141.

*113 cases of eggs v. U. S.*, 226 U. S. 172.

*Farrar v. Churchill*, 135 U. S. 609.

*Title Guarantee Co. v. U. S.*, 222 U. S. 401.

*U. S. v. Curry*, 6 Howard 106.

*Iron Works v. Sater*, 223 Fed. 611.

*Blaffer v. Water Co.*, 160 Fed. 389.

*Kentucky Coal Co. v. Hawes*, 153 Fed. 163.

*Rutan v. Johnson*, 130 Fed. 109.

*Lagan v. Goodwin*, 101 Fed. 654.

*In re Goodwin*, 101 Fed. 920.

*Brewster v. Evans*, 93 Fed. 628.

*Norman v. Chester Park Club*, 93 Fed. 576.

*Green v. Lynn*, 87 Fed. 839.

*Condon v. L. & T. Co.*, 73 Fed. 907.

We feel in view of the foregoing statutes and the foregoing decisions, that this court has no jurisdiction over this purported appeal, and that the appellee's motion to dismiss the appeal should be sustained, but the ap-

pellants are apparently invoking an Act of Congress approved September 16, 1922, which adds an amendment to Section 238 of the Judicial Code, which amendment is to be known as Section 238-a, and it is set out in the excerpt from the opinion of the United States Circuit Court of Appeals in the Eighth Circuit, in this case.

In response to that contention the appellee respectfully urges upon the attention of this Honorable Court, the fact that the appellee's rights became vested on October 7th, 1921, and it was not the intention of Congress to make the Act in question retroactive and the act is not capable of a retroactive construction, but even if it was capable of such construction and even if Congress intended it should be retroactive, then such an act with such a construction would be unconstitutional, null and void and violative of the fifth amendment of the Constitution of the United States.

Citizens of the United States are, by the fifth amendment of the Constitution of the United States, protected against the deprivation of their property, life or liberty, without due process of law and no act of Congress or legislative fiat can impair or destroy a vested right or title to property and certain it is, no act of Congress or legislative fiat constitutes a due process of law.

See *Chase v. U. S.*, 222 Fed. Rep. 593, citing:

*Choat v. Trapp*, 224 U. S. 665.

*Jones v. Mehan*, 175 U. S. 1.

*In re. Heff*, 197 U. S. 488.

*Cherokee Nation v. Hitchcock*, 187 U. S. 294.

*Chase v. U. S.*, 222 Fed. 593.

*Lowry v. Weaver*, 4 McLain, 82.  
*Wilson v. Wall*, 6 Wallace, 89.  
*Reichert v. Felps*, 6 Wall. 160.  
*U. S. v. Askerwik*, 180 Fed. 137.  
*U. S. v. Ry.*, 165 Fed. 742.  
*Jackson v. Goodell*, 20 Johns 188.  
*Taylor v. Drexel*, 21 Ark. 485.  
*Lewis v. Webb*, 3 Greenleaf 326.  
*Wash Rd. Co. v. Alexandria Co.*, 20 Gratton  
 (Va.) 31.  
*Davis v. Menasha*, 21 Wisc. 490.  
*Willoughby v. George*, 5 Colo. 80.  
*Baupre v. Hoerr*, 3 Minn. 366.  
*Wilson v. School Dist.*, 22 Minn. 488.  
*Taylor v. Place*, 4 R. I. 324.  
*San Mateo Co. v. Ry.*, 13 Fed. 151.  
*Murray v. Land Co.*, 18 How. 277.

Judge Wolverton in *United States v. Aakerwik*,  
 180 Fed. 143, has discussed the proposition and so clearly  
 stated the rule that we will presume upon the patience  
 of this Honorable Court, and set out the following excerpts  
 from the opinion, written by him, to-wit:

"When therefore, the term is at an end without the appropriate initiation of an available proceeding to revise or set aside the court's final judgment or decree, and no appeal or other means of review is prosecuted within the time afforded by authoritative regulations, such judgment or decree becomes an absolute finality, forever binding upon the parties and their privies, utterly without power of change, revision, revocation, or relief within the cause or proceeding in which it is rendered."

And further the judge says:

"This brings us to the last contention, namely, that the Act of Congress, so far as it authorizes

the impeachment of the court's judgment for fraud consisting of perjury in obtaining the judgment or for error in the court in determining the cause upon the evidence before it, is unconstitutional, as trenching upon the legitimate domain of the judiciary, and as unseating settled rights of individuals retrospectively. A judgment once rendered, if concerning property rights, settles them as between the litigants, or, if touching the status of either property or the person, determines that, the court possessing proper jurisdiction, and is and ought to be the end of litigation and the law, unless set aside or revised by some authoritative method known also to the law. Now, it is insisted that, under the long-established and well settled court practice, this judgment, declaring the respondent to be a citizen of the United States, had been fixed beyond the power of the court, to change, or to modify or set it aside, and that the Act of Congress authorizing the court again to review it is, in purpose and effect, authorizing a retrial, and thus to vacate the judgment, a thing that the court could not do previously. The Supreme Court has determined that an Act of Congress cannot annul a judgment of the Supreme Court, or impair the rights determined thereby, as respects adjudications upon the private rights of parties, and applied the principle as it pertained to a matter of costs, while it was held that the principal controversy did not come within the rule. *State of Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How. 421, 15 L. Ed. 435. And in *United States v. Klein*, 13 Wall. 128, 20 L. Ed. 519, the Supreme Court declared that Congress was unauthorized to deny to pardons granted by the President the effect which the court had previously adjudged them to have. The case was pending on appeal from the Court of Claims, and the effect of the legislation was to require the court to dismiss the appeal and

proceed no further in the case, and this although the Court of Claims had declared for the claimant upon the very evidence which Congress declared should have a certain contrary effect when brought to the attention of the appellate jurisdiction. Further than this, a previous case (*United States v. Padelford*, 9 Wall. 531, 19 L. Ed. 788), of like import, had been appealed to the Supreme Court, wherein the Court of Claims was affirmed and thus the effect of the President's pardons had been judicially determined. After stating the facts of the case more fully than here the court says:

'It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease, and it is required to dismiss the cause for want of jurisdiction.'

The great weight of authority elsewhere seems to determine the matter in accord with the contention. Mr. Black states the doctrine sought to be invoked thus:

'The power to open or vacate judgments is essentially judicial. Therefore, on the great constitutional principle of the separation of the powers and functions of the three departments of government, it cannot be exercised by the Legislature. While a statute may indeed declare what judgment shall in future be subject to be vacated, or when or how or for what causes, it cannot apply retrospectively to judgment already rendered and which had become final and unalterable by the court before its passage. Such an act would be unconstitutional and void on two grounds: First, because it would unlawfully impair the fixed and vested rights of the successful litigant; and, second, because it would

be an unwarranted invasion of the province of the judicial department. 1 Black on Judgments 298.'

Mr. Cooley is as explicit. He says:

'It is always competent to change an existing law by a declaratory statute; and where the statute is only to operate upon future cases, it is no objection to its validity that it assumes the law to have been in the past what it is now declared that it shall be in the future. But the legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the Legislature would in effect sit as a court of review to which parties might appeal when dissatisfied with the rulings of the courts.' Cooley's Constitutional Limitations (6th Ed.) p. 111."

In *De Chastellux v. Fairchild*, 15 Pa. 18, 20, 53 Am. Dec. 570, it is said:

"If anything is self-evident in the structure of our government, it is that the Legislature has no power to order a new trial, or to direct the court to order it either before or after judgment. The power to order new trials is judicial; but the power of the Legislature is not judicial. It is limited to the making of laws; not to the exposition or execution of them."

So again, in *State v. New York, N. H. & H. R. Co.*, 71 Conn. 43, 49, 40 Atl. 925, 928, the court says:

"The judgment is the final and supreme act of judicial power. The Legislature cannot overturn judgments, any more than the judiciary can make laws. A judgment is based upon established rules and principles administered by the judiciary."

In *Roche v. Waters*, 72 Md. 264, 19 Atl. 535, 7 L. R. A. 533, it is distinctly held that an act, so far as it authorizes a court to change the effect of decrees which before its passage had become final, is an exercise of judicial power by the Legislature, and is unconstitutional. This decision was given on a rehearing, and the question was exhaustively considered.

And again the court says in *Re Handley's Estate*, 15 Utah, 212, 220, 49 Pac. 829, 831 (62 Am. St. Rep. 926):

"The court having tried the case, construed the law in force at the time; and, having applied it to the facts, and entered a final decree, the Legislature could not afterwards, by a declaratory or explanatory act as to that case, give to the law a different construction, requiring a different decree, and invent a new remedy or change the old one, and require the court to retry the case and enter a new decree according to its new construction, and new and changed remedy."

So in *Atkinson v. Dunlap*, 50 Me. 111, 116 the court says:

"That the Legislature has constitutional jurisdiction over remedies is a proposition not to be controverted; but, after all existing remedies have been exhausted and rights have become permanently vested, all further interference is prohibited."

So, also, it is said in *Martin v. South Salem Land Co.*, 94 Va. 28, 36, 26 S. E. 591, 592:

"The Legislature within certain limitations may alter and control remedies by which litigants assert their rights in the courts, but when the liti-

gation has proceeded to judgment or decree upon the merits of the controversy, it has passed beyond its power."

See also, to a like purpose :

*Sparkhawk v. Sparkhawk*, 116 Mass. 315.

*Griffin's Ex'r. v. Cunningham*, 20 Grat. (Va.) 31.

*Davis and another v. Village of Menasha and others*, 21 Wis. 497.

*State v. Flint*, 61 Minn. 539, N. W. 1113.

As is said by Judge Field in the San Mateo County case and as indicated by the foregoing decisions, the Fifth Amendment of the Constitution of the United States is applicable to the Federal law and is the same character and receives the same construction as the 14th Amendment of the Constitution of the United States as applicable to the various states of the Union and we respectfully call the court's attention again to the foregoing Federal decision and the following decisions by the various courts.

*Plahn v. Gibernaud*, 85 N. J. Eq. 143 (decided Nov. 15, 1915).

*Atkinson v. Dunlap*, 50 Me. 111.

*Burch v. Newberry*, 10 N. Y. 374.

*Carleton & Slade v. Goodwin*, 41 Ala. 153.

*Johnson v. Gebhauer*, 159 Ind. 271.

*Blair v. Miller*, 4 Dallas 21.

*Dyer v. Belfast*, 88 Me. 140.

*Marpole v. Cather*, 78 Va. 239.

*Ford v. Lenander*, 145 Ia. 107.

*Weiland v. Shillock*, 24 Minn. 348.

*Germania Savings Bank v. Suspension Bridge*, 159 N. Y. loc. cit. 368.

*Sydnor et al. v. Palmer*, 32 Wis. 408.



- Town of Lancaster v. Barr*, 25 Wisc. 562.  
*Blakeley & Copeland v. Frazier*, 15 S. Car. 615.  
*Weaver v. Lapsley*, 43 Ala. 226.  
*McCabe v. Emerson*, 18 Pa. St. 112.  
*Greenwood v. Butler*, 52 Kans. 428.  
*Gilman v. Tucker*, 128 N. Y. 204.  
*State of Pa. v. Bridge Co.*, 18 Howard 431.  
*Cassard v. Tracy*, 52 La. Ann. 848 (l. c.).  
*Cooley on Constitutional Limitations* 7th Ed.  
     p. 138 (and notes) p. 521 (and note).  
*Ratcliff v. Anderson*, 31 Gratton (Va.) 105.  
*Hill v. Town of Sunderland*, 3 Vermont 509.  
*Roche v. Waters*, 72 Md. 272.  
*Wilson v. School District*, 22 Minn. 488.

In *Plahn v. Givernaud*, 85 N. J. Eq. 143 (decided Nov. 15, 1915), l. c. 145-146, the New Jersey Court says:

"The decree having established a property right, and that right having become vested by the expiration of the time within which an appeal might have been taken, it could not thereafter be impaired by legislative enactment. This is the doctrine declared by the Court of Appeals of New York in *Germania Savings Bank v. Suspension Bridge*, 159 N. Y. 362, and by the Supreme Court of Maine in *Atkinson v. Dunlap*, 50 Me. 111. It is fully supported by the reasoning of Chief Justice Beasley in the opinion delivered by him in our Supreme Court in *Ryder v. Wilson's Executors*, 41 N. J. Law, 10, and by that of Justice Dixon, speaking for this court, in the case of *Moore v. State*, 34 N. J. Law, 203, and meets with our entire approval. We are not to be understood as denying the power of the Legislature to extend the time to appeal before that right had expired by limitation. What we do determine is that a statute like that which we have

been discussing is unconstitutional, so far as it operates to revive a right of appeal after it has expired under the then existing law, and property rights have thereby become vested."

We respectfully urge that upon the face of the record this Honorable Court is without jurisdiction over the purported appeal in this cause and that the said purported appeal should be by this court dismissed.

All of which is respectfully submitted.

ALBERT S. MARLEY,  
*Attorney for Appellee.*



Office

APR

WM. E.

IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1922.

McMILLAN CONTRACTING COMPANY, a  
corporation, and FIDELITY NATIONAL  
BANK AND TRUST COMPANY OF  
KANSAS CITY, a corporation,

*Appellants.*

v.

B. HAYWOOD HAGERMAN,

*Appellee.*

**Appellants' Motion to Remand  
and Memorandum in Support Thereof.**

JUSTIN D. BOWERSOCK,  
ARTHUR MILLER,  
SAM'L J. McCULLOCH,  
FRANK P. BARKER,  
G. V. HEAD,

*Attorneys for Appellants.*



IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1922.

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McMILLAN CONTRACTING COMPANY, a  
corporation, and FIDELITY NATIONAL  
BANK AND TRUST COMPANY OF  
KANSAS CITY, a corporation,

*Appellants.*

v.

No. 737

B. HAYWOOD HAGERMAN,

*Appellee.*

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**NOTICE OF APPELLANTS' MOTION TO REMAND.**

To B. Haywood Hagerman, Appellee, and to Albert S. Marley, his attorney of record:

You and each of you are hereby notified that on Monday, the ~~2nd~~<sup>16th</sup> day of April, 192~~2~~<sup>3</sup>, at the convening of Court or as soon thereafter as counsel can be heard, the undersigned will present and submit to the Supreme Court of the United States, a motion to remand the above entitled cause to the United States Circuit Court of Appeals for the Eighth Circuit, and memorandum in support thereof. A true copy of

appellants' motion to remand and of the memorandum in support thereof are hereto attached and made a part hereof.

JUSTIN D. BOWERSOCK,

ARTHUR MILLER,

SAM'L J. McCULLOCH,

FRANK P. BARKER,

G. V. HEAD,

*Attorneys for Appellants.*

Service of the foregoing notice and a copy of the motion to remand and memorandum in support thereof therein referred to is hereby acknowledged this 27th day of March, 1923.

ALBERT S. MARLEY,

*Attorney for Appellee.*

IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1922.

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McMILLAN CONTRACTING COMPANY, a  
corporation, and FIDELITY NATIONAL  
BANK AND TRUST COMPANY OF  
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No. 737

B. HAYWOOD HAGERMAN,

*Appellee.*

---

**APPELLANTS' MOTION TO REMAND.**

Come now the appellants above named and respectfully move the Court to remand this cause to the United States Circuit Court of Appeals for the Eighth Circuit, for the following reasons, to-wit:

1. This is a suit in equity instituted in the District Court of the United States for the Western District of Missouri, for the purpose of having certain tax bills, issued by Kansas City, Missouri, adjudged null and void and to have them removed as a cloud on appellee's title, upon three grounds set up in the bill: That the Charter of Kansas City and the ordinance authorizing the issuance of the bills are in contravention of the



constitution of the United States; that the Charter and ordinance were not complied with; and that the Charter itself was violated in the issuance of the bills. The answers put in issue all these grounds.

2. The case therefore involved three questions: A claim that a state law is in violation of the United States Constitution; a claim that the Kansas City Charter was not complied with; and a claim that the Charter had been violated. The jurisdiction of the District Court was rested upon the first claim.

3. On July 7, 1921, the District Court entered a final decree in favor of the appellee, adjudging the tax bills to be null and void.

4. Within six months thereafter, and on January 4, 1922, appellants duly filed in the District Court their petition for appeal from said decree to the United States Circuit Court of Appeals for the Eighth Circuit, which said petition was duly allowed by the District Court and said appeal duly granted on January 4, 1922. Said appeal was thereafter duly filed and docketed in said Circuit Court of Appeals, and all necessary steps were taken for the due hearing of said appeal in said court.

5. Thereafter the appellee filed in said Circuit Court of Appeals his motion to dismiss said appeal upon the ground that said court had no jurisdiction to hear and determine the same, and on October 23, 1922, said Court, being of the opinion that it had no jurisdiction of said appeal, but that said appeal should have been taken direct to the Supreme Court of the United States, entered an order transferring the

appeal to the Supreme Court under the terms of the Act of Congress approved September 14, 1922, amending the Judicial Code by adding thereto Section 238a.

6. In consideration of the fact that the jurisdiction of the United States Circuit Court of Appeals, under Sections 128 and 238 of the Judicial Code depends upon the nature of the questions involved in the suit and not upon the grounds of jurisdiction of the District Court, and by reason of the fact that there are in this case three questions involved, one coming within the jurisdiction of the Supreme Court under Section 238, and two coming within the jurisdiction of the Circuit Court of Appeals under Section 128, appellants allege that the Circuit Court of Appeals for the Eighth Circuit had jurisdiction of said appeal; that said appeal was properly taken and allowed to said court, and that said court should have overruled the motion to dismiss and proceeded to hear and determine said appeal in due course.

Wherefore, appellants pray that this cause be remanded to the United States Circuit Court of Appeals for the Eighth Circuit with instructions to hear and determine the appeal herein, or that this Court in its discretion under the terms of Sections 239 240 and 262 of the Judicial Code, proceed to hear and determine the same as upon certificate from said Circuit Court of Appeals.

JUSTIN D. BOWERSOCK,  
ARTHUR MILLER,  
SAM'L J. McCULLOCH,  
FRANK P. BARKER,  
G. V. HEAD,

*Attorneys for Appellants.*

IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1922.

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McMILLAN CONTRACTING COMPANY, a  
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*Appellants,*

v.

No. 737

B. HAYWOOD HAGERMAN,

*Appellee.*

---

**MEMORANDUM FOR APPELLANTS ON MOTION TO  
REMAND.**

The order of the Circuit Court of Appeals for the Eighth Circuit, transferring the case to this Court, was based upon the Act of Congress, approved September 14, 1922, providing in effect that when an appeal has been taken to the wrong appellate court, it shall not be dismissed but shall be transferred to the right appellate court. The Court of Appeals held that the appeal in this case should have been taken to the Supreme Court, that the Court of Appeals was the wrong appellate court and that the case was one coming within the

terms of the act. We contend that the appeal was properly taken to the Court of Appeals.

The position of the appellee in the Circuit Court of Appeals and the holding of that court in transferring the case to the Supreme Court was that, since the jurisdiction of the District Court rested solely on the claim that a law of the state of Missouri is in controvention of the Federal Constitution, the Circuit Court of Appeals was without jurisdiction of the appeal.

In answer to this contention, appellants urge that under the Federal statutes and decisions, the grounds of jurisdiction of the District Court are not the criterion of appellate jurisdiction but that the latter depends upon the nature of the questions involved in the case.

It will be seen that appellants were confronted with the dilemma and are possibly caught in the "trap" referred to by Chief Justice Taft in an address to the American Bar Association at San Francisco, reported in the Journal of American Bar Association for October, 1922, at page 603, a trap created by the attempt of the statute to define the appellate jurisdiction of each court and by the language of the Supreme Court in certain cases hereinafter cited, interpreting that statute. We most earnestly urge that a fair consideration of the actual points decided by the Supreme Court and a slight modification of its language in a few cases, will do away with the trap so far as affects this appeal and assure appellants a hearing upon the merits, either in the Circuit Court of Appeals or in this Court.

We contend first that the appeal was properly taken; and second that, if it was not, it was properly certified here under the act of September 14, 1922.

## I.

Section 238 of the Judicial Code provides that direct appeals may be taken from the District Court to the Supreme Court (1) in any case in which the jurisdiction of the District Court is in issue, the question of jurisdiction alone being certified to the Supreme Court; (2) from the final sentences and decrees in prize causes; and (3) in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States. For present purposes at least, this section constitutes the entire authority of the Supreme Court to entertain appellate jurisdiction.

This section contains no word referring even remotely to the grounds of jurisdiction of the District Court. The right of appeal to the Supreme Court is based wholly on the character of the case or of the questions raised therein. Cases where the jurisdiction of the District Court is *in issue*; prize causes, cases that *involve* the Constitution, or in which constitutionality is *drawn in question*, or in which a law is *claimed* to be unconstitutional—these are the requirements laid down by the statute for a direct appeal. If construction is necessary to sustain this reading, the Supreme Court has several times so construed the section.

*Holder v. Aultman*, 169 U. S., 81, 18 S. Ct., 269;

*Loeb v Columbia Township Trustees*, 179 U. S., 472  
21 S. Ct., 174;

*Boise Water Co. v. Boise City*, 230 U. S., 84, 33 S. Ct.,  
997.

Other cases to the same effect, but touching more exactly the main question under the motion, will be referred to hereafter.

It may, then, be laid down as an established principle that the jurisdiction of the Supreme Court to entertain and determine direct appeals from the District Courts is not affected in any way whatsoever by the grounds of jurisdiction of the District Courts. There is no case to the contrary.

## II.

Section 128 of the Judicial Code provides that the Circuit Courts of Appeals shall exercise appellate jurisdiction to review decisions of the District Courts "in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred thirty-eight." This would seem, at first blush, to be equally clear with Section 238. There is no reference whatsoever to grounds of jurisdiction of the District Courts. There is the simple provision that appeal lies to the Circuit Courts of Appeals in all cases in which it does not lie to the Supreme Court, the question being dependent entirely upon the character of the case or of the questions raised therein.

## III.

It was undoubtedly the "intention of the act in general that appellate jurisdiction should be distributed." *American Sugar Refining Co. v New Orleans*, 181 U. S. 277, 21 S. C.,

646. It may have been the intention to make the two sections mutually exclusive. But the Supreme Court has determined otherwise, and it may now be considered as established by the decisions of this Court:

(a) That where the *only question involved* is one covered by Section 238, the Supreme Court has exclusive jurisdiction of an appeal from the District Court.

*Union & Planters Bank v Memphis*, 189 U. S. 71,  
23 S. Ct., 604;

*Vicksburg v Water Works Co.*, 202 U. S., 453, 26  
S. Ct., 660;

*Carolina Glass Co. v South Carolina*, 240 U. S., 305,  
36 S. Ct., 293;

*Raton Water Works Co. v. Raton*, 249 U. S. 552,  
39 S. Ct., 384.

(b) That where the *only question involved* is one not covered by Section 238, the proper Circuit Court of Appeals has exclusive jurisdiction of an appeal from the District Court.

*Sugarman v United States*, 249 U. S., 182, 39, S.  
Ct., 191.

(c) That where two or more *questions are involved*, one of which is covered by Section 238, and one of which is not, then an appeal will lie to either court, neither being ousted of its jurisdiction because of the presence of questions which would give the other jurisdiction. To this extent, the appellate jurisdiction of the two courts is concurrent.

*Robinson v Caldwell* 165 U. S., 359, 17 S. Ct., 343;

*Carter v Roberts*, 177 U. S., 496, 20 S. Ct., 713;  
*Loeb v Columbia Township Trusees*, 179 U. S.,  
 472, 21 S. Ct., 174;  
*Spreckles Sugar Refining Co. v McClain*, 192 U. S.,  
 397, 24 S. Ct., 376;  
*Macfadden v United States*, 213 U. S., 288, 29 S.  
 Ct., 490;  
*Pomona v Sunset Tel. Co.*, 224 U. S. 330, 32 S. Ct.,  
 477;  
*Lemke v Farmers' Grain Co.*, 42 S. Ct., 244.

In *Robinson v Caldwell*, 165 U. S., 359, 17 S. Ct., 343 the defendant appealed direct from the Circuit Court to both the Circuit Court of Appeals and to the Supreme Court. The former heard and determined the appeal before it. The Supreme Court thereupon dismissed the appeal pending before it, in spite of the presence in the record of questions authorizing a direct appeal to it, namely, the construction of a treaty and the constitutionality of a Federal statute.

*Carter v. Roberts*, 177 U. S., 496, 20 S. Ct., 713, involved two questions: The construction of a Federal statute and its constitutionality. The defendant appealed to both courts. The Circuit Court of Appeals heard and determined the cause. The Supreme Court declined to take jurisdiction under the direct appeal, holding that under the circumstances it had jurisdiction only on certiorari or appeal from the Circuit Court of Appeals. The court says, (p. 500):

“When cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this court, and if such cases are carried to the circuit courts of appeals, those courts may decline to take jurisdiction, or where



**such construction or application is involved with other questions,** may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance."

In *Loeb v Columbia Township Trustees*, 179 U. S., 472, 21 S. Ct., 174, the bill presented only a case of diversity of citizenship. The defendant by demurrer raised the question of constitutionality. The Supreme Court upholds its jurisdiction of a direct appeal, though stating that plaintiff might have appealed to the Circuit Court of Appeals.

The bill in *Spreckles Sugar Refining Co. v McClain*, 192 U. S., 397, 24 S. Ct., 376, alleged both the unconstitutionality of a Federal revenue act and also its misconstruction by the enforcing officers. In sustaining a writ of error to the Circuit Court of Appeals and a writ of error from that court to the Supreme Court, the latter holds that an appeal might go direct to either court.

In *Macfadden v U. S.*, 213 U. S., 288, 29 S. Ct., 490, on writ of error to the Circuit Court of Appeals from the Supreme Court, it is again laid down that if there is a *question involved* giving the former jurisdiction on appeal, that jurisdiction is not ousted because of a question warranting direct appeal to the Supreme Court. The Court reiterates that in such cases, appeals might be taken to either court.

To the same effect is *Pomona v Sunset Tel. Co.*, 224 U. S., 330, 32 S. Ct., 477.

And in *Lemke v Farmers Grain Co.*, 42 S. Ct., 244 a case relied on by appellee, and to which we shall refer later the *holding* of the Supreme Court is that where there is a **question involved** giving the Circuit Court of Appeals jurisdiction

and also one giving the Supreme Court jurisdiction, an appeal may go to either.

#### IV.

The case at bar is one coming within the rule discussed in paragraph (c) of Point III above. It involves (subject to the contention made herein under Point VI) a claim that the law of a state is in contravention of the Constitution of the United States, under Section 238; and it unquestionably involves two entirely independent claims: one that the provisions of the Charter of Kansas City have been violated; and the other that the charter and ordinances of the city have not been complied with. These issues are all tendered by the bill itself and are met by the answers.

The bill is one to have certain tax bills issued by Kansas City declared null and void and to have them removed as a cloud on plaintiff's title. The bill alleges that the tax bills are void for three distinct reasons; first, that the charter of Kansas City and the ordinance under which the tax bills purport to have been issued, are in violation of the Constitution of the United States (Paragraphs 13 and 19); second, that the charter and ordinance were not complied with, in that a certain suit required therein to be filed was not filed (Paragraphs 6, 8 and 13); third, that Section 28 of Article VIII of the charter was violated in the issuance of the bills (Paragraph 17).

These were the issues upon which the case was tried, evidence was heard upon them all, the trial court considered them all and held the tax bills void. The decree does not specify the grounds upon which the court acted. The opinion of the court shows that the charter and ordinance were not held unconstitutional<sup>1</sup>, but that the tax bills were deemed to be

confiscatory because of the method of carrying the charter provisions into effect. However, the grounds of action of the trial court could not in any way affect the question of appellate jurisdiction.

It is evident, therefore, that the case is one which under the authorities might be appealed to either this Court or the Circuit Court of Appeals (subject to the contention herein made under Point VI). Granting for the moment that the claim that the charter and ordinance were in contravention of the United States Constitution is *bona fide* and substantial, an appeal would lie to the Supreme Court under Section 238. There being also two questions not covered by Section 238, namely, the issue as to compliance with the charter and ordinance in the matter of the suit to be filed, and the issue as to the violation of Section 28 of Article VIII of the charter, an appeal would lie to the Circuit Court of Appeals under Section 128.

These several questions are not interdependent; none of them arise incidentally; the solution of one does not in any way affect or depend upon the others. They bring the case clearly within the language and ruling of the authorities cited in paragraph (c) of point III above. It follows that the appeal was properly taken to the Court of Appeals in spite of the claim that appellants might have taken it direct to the Supreme Court.

## V.

To combat this conclusion, appellee relies upon the language of five opinions in the Supreme Court in cases passing upon this question of appellate jurisdiction. These cases are:

- American Sugar Refining Co. v New Orleans*, 181 U. S., 277, 21 S. Ct., 646;  
*Union & Planters' Bank v Memphis*, 189 U. S., 71 23 S. Ct., 604;  
*Carolina Glass Co. v South Carolina*, 240 U. S., 305, 36 S. Ct., 293;  
*Raton Water Works Co. v Raton*, 249 U. S., 552, 39 S. Ct., 384;  
*Lemke v Farmers' Grain Co.*, 42 S. Ct., 244.

We may submit that there is language in all these opinions seeming to lend weight to appellee's contention—a contention that appellate jurisdiction direct from the District Courts depends, not upon the questions involved but upon the grounds of jurisdiction in the District Court. The contention, unless established by the language referred to, is utterly without any basis whatsoever in the statutes or in the authorities.

As said by the Supreme Court in *Macfadden v U. S.* 213 U. S., 288, 29 S. Ct., 490, “the language of the opinion should be interpreted in the light of the facts of the case.” With this caution in mind, we ask a consideration of the five decisions relied upon by appellees.

1. In *American Sugar Refining Co. v New Orleans*, 181 U. S., 277, 21 S. Ct., 646, the suit was originally filed in the state court and was removed to the United States Court solely because of diversity of citizenship. A constitutional question was raised in defense. The case was taken to the Circuit Court of Appeals on writ of error, which was dismissed by that court because a constitutional question was involved. On certiorari to the Supreme Court, the question was whether the

Court of Appeals had jurisdiction to dispose of the writ of error. The Supreme Court held that it had.

The decision is clearly right, and in line with the principles stated in Point III above. The constitution being involved, an appeal would have been proper to the Supreme Court. Diversity of citizenship being involved, an appeal was proper to the Circuit Court of Appeals. The Supreme Court does say that there is a right to appeal to either court in cases where *jurisdiction* below is rested both on citizenship and on a constitutional question. But if we interpret that language in the light of the fact that diversity of citizenship and constitutionality were the issues involved in the case, we have no right to draw the inference that those constitute the *only* basis for appeal to either court.

2. *Union & Planters' Bank v Memphis*, 189 U. S., 71, 23 S. Ct., 604, is a case in which appeals were taken from the Circuit Court both to the Circuit Court of Appeals and to the Supreme Court. The Court of Appeals heard the case and entered a judgment from which, also, an appeal was prosecuted to the Supreme Court. The latter considered together the direct appeal from the Circuit Court and the appeal from the Court of Appeals. The Supreme Court decided the case upon the direct appeal, reversing the judgment of the Circuit Court of Appeals, not upon the merits, but because the appeal was not within the jurisdiction of the latter court.

The decision is clearly right. The only question involved in the case is that a state law is in contravention of the United States Constitution. That question gave the Supreme Court jurisdiction under Section 238, and there was no diversity of citizenship or other question bringing the appeal under the terms of Section 128. The jurisdiction of the Supreme Court was therefore exclusive.

There is language in the opinion discussing the grounds of jurisdiction alleged in the bill. But the court's attention was not challenged to the matter. The language is appropriate to the exact question presented by the record and it should be so interpreted. Under the facts of that case, the *questions involved* and the *grounds of jurisdiction* of the Circuit Court were identical. The sole question involved was the claim of unconstitutionality; the sole ground of jurisdiction of the Circuit Court was the claim of unconstitutionality. The decision is that the single claim of unconstitutionality gave the Supreme Court exclusive jurisdiction on appeal. The language should not be given wider significance.

3. Again in *Carolina Glass Co. v South Carolina*, 240 U. S., 305, 36 S. Ct., 293, a case very similar so far as procedure is concerned to *Union & Planters' Bank v Memphis*, the sole question involved was the constitutional question, which was as well the sole question on which jurisdiction was alleged. The decision is unquestionably right. The Supreme Court had exclusive jurisdiction under Section 238 and the Circuit Court of Appeals therefore had none under Section 128. The language of the opinion should be interpreted in the light of the facts of the case.

4. *Raton Water Works Co. v Raton*, 249, U. S., 552, 39 S. Ct., 384, is a similar case. The jurisdiction of the District Court was based entirely on a claim that a law of a state was unconstitutional. This was also the only question involved. Upon appeal to the Circuit Court of Appeals for this Circuit, the question of appellate jurisdiction was certified to the Supreme Court. The latter court properly held that the Circuit Court of Appeals had no jurisdiction of the appeal. The lan-

guage of the opinion refers to the basis of jurisdiction of the District Court, because that was the exact situation presented by the facts. The sole basis of jurisdiction, however, and the sole question involved were in that case identical and the language should not be applied to a different case.

5. *Lemke v Farmers Grain Co.*, 42 S. Ct., 244, is, we believe, the last case on the subject. In that case, the bill alleged the unconstitutionality of a state law and also its repugnancy to a federal statute. Here, therefore, were two questions involved; first, was the state law constitutional; second, was it repugnant to the federal statute. The same two questions went to the jurisdiction of the District Court in the first instance—the jurisdiction of the District Court might rest on either. The Supreme Court holds that an appeal would lie to the Circuit Court of Appeals, and from the Circuit Court of Appeals to the Supreme Court under Section 128. This is clearly in line with the established doctrine.

Again, however, language is used capable of too broad application. The case did present two questions raised on the bill,—constitutionality and repugnancy to a federal statute, each of which constituted a basis for jurisdiction in the District court. The Supreme Court says that where jurisdiction is invoked solely upon constitutional grounds the appeal must go to the Supreme Court, but that where jurisdiction is invoked also upon other federal grounds it may go to the Court of Appeals.

If this language is interpreted in the light of the facts, it is defensible and correctly states the law. If on the other hand, it is interpreted to mean that in every case appellate jurisdiction is dependent upon the grounds invoked by the bill, it is contrary to the terms of the statutes themselves and of

a line of Supreme Court decisions construing those statutes. As to the jurisdiction of the Supreme Court, it has been directly and conclusively decided by the authorities cited herein under Point I and many others, that the grounds alleged in the bill are utterly immaterial. So far, at least, under all the cases, the language of *Lemke v. Farmers Grain Co.*, is wrong, if interpreted as placing the question upon the grounds of jurisdiction of the District Court.

6. As to the jurisdiction of the Circuit Court of Appeals, the very cases cited in *Lemke v. Farmers Grain Co.*, indicate conclusively that the language must not be so broadly interpreted; and there are other decisions to the same effect.

The case of *Loeb v Columbia Township Trustees*, 179 U. S., 472, 21 S. Ct., 174, is the earliest authority we have found directly considering this matter. In that case, jurisdiction of the Circuit Court was rested on diversity of citizenship alone. A constitutional question arose on demurrer, and a writ of error was taken direct from the Supreme Court. That court holds that its jurisdiction under the statute depends not at all on the grounds alleged in the petition as giving the trial court jurisdiction, but wholly on the fact that a constitutional question is involved. The Court expressly points out a distinction between the provisions of the statute covering direct appeals to the Supreme Court and to the Courts of Appeals, and the provisions of the statute relative to appeals from the Courts of Appeals themselves to the Supreme Court. In the latter case *only* are the grounds of jurisdiction of the trial court mentioned or referred to in the statute. The questions are disposed of in the following manner:

“The petition shows that the parties are citizens of different states. It states no other ground of Federal



jurisdiction. If nothing more appeared bearing upon the question of jurisdiction, then it would be held that this court was without authority to review the judgment of the circuit court." (Page 477).

"It is said that, even if the record shows such a claim to have been made, it will not avail the plaintiff; for, it is argued, when the jurisdiction of the circuit court is invoked by the plaintiff only on the ground of diverse citizenship, a claim by the defendant of the repugnancy of a state law to the Constitution of the United States is not sufficient to give this court jurisdiction, upon writ of error, to review the final judgment of the circuit court sustaining such claim. Such an interpretation of the 5th section is not justified by its words. Our right of review by the express words of the statute extends to 'any case' of the kind specified in the 5th section. And the statute does not in terms exclude a case in which the Federal question therein was raised by the defendant. " (Page 477).

"It is true that the plaintiff might have carried this case to the circuit court of appeals, and, a final judgment having been rendered in that court upon his writ of error, he could not thereafter have invoked the jurisdiction of this court upon another writ of error to review the judgment of the circuit court." (Page 478).

**"When the question is whether a judgment of the circuit court of appeals is final in a particular case, it may well be that the jurisdiction of the circuit court is, within the meaning of that section, to be regarded as dependent entirely upon the diverse citizenship of the parties if the plaintiff invoked the authority of that court only upon that ground; because in such case the jurisdiction of the court needed no support from the averments of the answer, but attached and became complete upon the allegations of the petition. But no such test of the jurisdiction of this court to review the final judgment of the circuit court is prescribed by the 5th section. Our jurisdiction depends only on the inquiry whether that judgment was in a case in which it was**

claimed that a state law was repugnant to the Constitution of the United States." (Page 479).

Following the Loeb case and directly in line with it, is *Spreckles Sugar Refining Co. v McClain*, 192 U. S., 397, 24 S. Ct., 376. The bill in that case was not based on diversity of citizenship either in whole or in part. It alleged the unconstitutionality of a federal revenue act and also a misconstruction thereof. On error to the Circuit Court of Appeals, it is held that the appeal might have gone to either court. In a very clear and logical presentation of the principles governing its action, the Supreme Court says, (Page 407):

"Was the judgment of the circuit court subject to review only by this court, or was it permissible for the plaintiff to take it to the circuit court of appeals? If the case, as made by the plaintiff's statement, had involved no other question than the constitutional validity of the act of 1898, or the construction or application of the Constitution of the United States, this court alone would have had jurisdiction to review the judgment of the circuit court. *Huguley Mfg. Co. v Galtton Cotton Mills*, 184 U. S. 291, 295, 46 L. Ed. 546, 549, 22 Sup. Ct. Rep., 452. But the case distinctly presented other questions which involved simply the construction of the act; and those questions were disposed of by the circuit court at the same time it determined the question of the constitutionality of the act. If the case had depended entirely on the construction of the act of Congress—its constitutionality not being drawn in question—it would not have been one of those described in the 5th section of the act of 1891, and, consequently, could not have come here directly from the circuit court. **As, then, the case made by the plaintiff involved a question other than those relating to the constitutionality of the act and to the application and construction of the Constitution, the circuit court of appeals had jurisdiction to review the judgment of the circuit court, although, if the**

plaintiff had elected to bring it here directly, this court would have had jurisdiction to determine all the questions arising upon the record. The plaintiff was entitled to bring it here directly from the circuit court, or, at its election, to go to the circuit court of appeals for a review of the whole case. Of course, the plaintiff, having elected to go to the circuit court of appeals for a review of the judgment, could not thereafter, if unsuccessful in that court upon the merits, prosecute a writ of error directly from the circuit court to this court. *Robinson v Caldwell*, 165 U. S., 359, 41 L. Ed. 745, 17 Sup. Ct. Rep., 343; *Loeb v Columbia Twp.*, 179 U. S., 472, 45 L. Ed., 280, 21 Sup. Ct. Rep., 174; *Ayers v. Polsdorfer*, 187 U. S., 585, 47 L. Ed., 314, 23 Sup. Ct. Rep., 196."

The Court then proceeds to discuss the provisions of Section 128, relative to appeals from the Circuit Court of Appeals to the Supreme Court, as to which the grounds of jurisdiction of the trial court are expressly made material by the statute. The entire opinion of the court on the question of appellate jurisdiction (pp. 405-410) is in accord with our position in this memorandum.

These two cases were confirmed by *Macfadden v. U. S.*, 213 U. S., 288, 29 S. Ct., 490. That was on indictment under a federal statute. A constitutional question became involved later. On error to the Circuit Court of Appeals, the Supreme Court holds that either court had jurisdiction on appeal. The basis of appellate jurisdiction is again pointed out by the court and it is again denied that the grounds of jurisdiction alleged in the bill have any bearing on the question. The Court says, (Page 293):

"Assuming, without decision, that the constitutional questions were real and substantial, it is clear that a

writ of error might have been sued out originally directly from this court under clause 5. *Loeb v. Columbia Twp.*, 179 U. S., 472, 45 L. Ed., 280, 21 Sup. Ct. Rep., 174. But this was not done, and by the appeal to the circuit court of appeals, the right of direct appeal here was lost. *Robinson v. Caldwell*, 165 U. S., 359, 41 L. Ed., 745, 17 Sup. Ct. Rep., 343.

Section 6 of the act provides that the circuit courts of appeal shall exercise appellate jurisdiction 'in all cases other than those provided for in the preceding section of this act:' and the fact that there were in the case questions which would have warranted a direct appeal to this court does not deprive the circuit court of appeals of its jurisdiction. *American Sugar Ref. Co. v. New Orleans*, 181 U. S., 277, 45 L. Ed., 859, 21 Sup. Ct. Rep., 646. In the case at bar the circuit court of appeals has assumed jurisdiction and rendered judgment. May the petitioner have a writ of error directed to that judgment? The answer to this question depends upon whether the judgment of the circuit court of appeals was final. The act contemplated that certain judgments of the circuit court of appeals might be reviewed on writ of error in this court, and that certain other judgments could not be so reviewed. The line of division is marked in §6 of the act. **It is to be observed that the line of division between cases appealable to this court and those appealable to the circuit court of appeals, made by § 5 of the act, is based upon the nature of the case or of the questions of law raised.** But the line of division between cases appealable from the circuit court of appeals to this court and those not so appealable, drawn by § 6, is different, and is determined, not by the nature of the case or of the question of law raised, but by the sources of jurisdiction of the trial court, namely, the circuit court or the district court,—whether the jurisdiction rests upon the character of the parties or the nature of the case. *Huguley Mfg. Co. v. Galtion Cotton Mills*, 184 U. S. 290, 46 L. Ed., 546, 22 Sup. Ct. Rep., 452, where it was said by the chief justice,

citing cases, 'the jurisdiction referred to is the jurisdiction of the circuit court as originally invoked.' **The difference in the test for determining whether a case is appealable from the trial court directly to this court, and the test for determining whether a case is appealable from the circuit court of appeals to this court, is important, and a neglect to observe it leads to confusion."**

The case of *Pomona v Sunset Tel. Co.*, 224 U. S., 330 32 S. Ct., 477, is directly in line with these authorities. The Court says, at page 342 of the opinion:

"This is a bill brought by the appellee, a California corporation, to restrain the city of Pomona from removing the appellee's poles and wires from the streets of the city, and from preventing the appellees placing further poles and wires in the streets. The circuit court dismissed the bill (164 Fed., 561), but the decree was reversed and an injunction granted by the circuit court of appeals (97 C. C. A., 251, 172 Fed., 829). Two of the grounds originally relied upon were that the appellee, being a telegraph as well as a telephone company, had rights under the act of Congress of July 24, 1866, Chap. 230, 14 Stat. at L. 221 (Rev. Stat. § 5263 *et seq.* U. S. Comp. Stat. 1901, p. 3579), that were infringed, and that the conduct of the city had given rise to a contract. These are no longer pressed, but they warranted taking the case to the circuit court of appeals. *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S., 397, 407, 48 L. Ed. 496, 499, 24 Sup. Ct Rep., 376. The remaining ground is that the Constitution of California, as amended in 1911, or the statutes of the state, contained a grant with which the Constitution of the United States does not permit the city to interfere. This is the only argument pressed here. Unless the appellee got a grant from one of these two sources, it has no right to occupy the streets."

Not one of these cases has ever been questioned or its holding modified in anyway and two of them, *Spreckels Sugar Refining Co. v. McClain* and *Pomona v Sunset Tel. Co.*, are cited as authorities in *Lemke v. Farmers' Co.*, 42 S. Ct., 244, relied on by appellee.

In view of the plain terms of the statute and of the unquestioned soundness of these authorities, we submit that the language of the Supreme Court in the cases apparently adverse must be read as that court itself demands in the light of the issues presented in those cases. To read the language otherwise, throws the decisions upon an important matter of appellate jurisdiction into conflict and confusion; to read it so, harmonizes the authorities and makes the provisions of the statute clear and comprehensive.

A very strong presentation of the question will be found in an article by Charles W. Bunn, Esq., of St. Paul, Minn., in 35 Harvard Law Review 902.

## VI.

It is by no means clear that there is a constitutional question involved in this appeal sufficient to bring the case to the Supreme Court direct from the District Court. It is quite possible that appellant would have found himself in as great difficulty if he had taken the other horn of the delima by appealing to this Court,

The 14th Amendment protects against *state* action only. Admittedly, the act of a city is, in the proper case, an act of the state within the meaning of the Amendment. However,

the action of the city can be imputed to the state only when the municipality is acting within the scope of its delegated powers. A bill which alleges that the acts in question were outside the scope of the city's authority, does not invoke the 14th Amendment.

*Barney v. New York*, 193 U. S., 430, 24 S. Ct. 502.

Paragraph 6 of the bill very definitely avers that by reason of the failure of the city to comply with Section 24 of Article VIII of the charter, with respect to the suit in the circuit court required by that section,

"the Board of Park Commissioners was without right or authority to let a contract for said work, and the Board of Public Works was without right or power to apportion or levy the cost of said work against the lands in said benefit district, or to issue tax bills for such work against said lands."

Again in paragraph 17 of the bill appears the following:

"Complainant states that the taxing of his lands, which are far removed from and have no access to or use of said boulevard, at the same rate as the lands immediately fronting on and particularly benefited by said boulevard, was in violation of said Section 28 of Article VIII of the Kansas City Charter, which requires that the tax for such grading costs shall be laid 'in proportion to the benefits accruing to the several parcels of land' in the benefit district, and was palpably discriminatory, inequitable and unjust."

Such allegations do not invoke the 14th Amendment, but, on the contrary, prevent its application.

*Hamilton Gas Light Co. v. Hamilton City*, 146 U. S., 258, 13 S. Ct., 95;

*Barney v. New York*, 193 U. S., 430, 24 S. Ct., 502;  
*Siler v Louisville & N. Ry. Co.*, 213 U. S., 175, 29  
 S. Ct., 451;

*Memphis v. Cumberland Tel. & Teleg. Co.*, 218 U.  
 S., 624, 31 S. Ct., 115.

The allegations in the bill with regard to the lack of proper service of process on the appellee in the Circuit Court suit brought by the city in purported compliance with the charter, raise no constitutional question. An allegation that the judgment of a state court is violative of due process because the court was without jurisdiction to render the judgment, does not invoke the 14th Amendment.

*Carey v. Houston & Texas Ry. Co.*, 150 U. S., 170  
 14 S. Ct., 63;

*Cornell v. Green*, 163 U. S., 75, 16 S. Ct., 969;

*Cosmopolitan Mining Co. v. Wash.*, 193 U. S., 460,  
 24 S. Ct., 489;

*Burt v. Smith*, 203 U. S., 129, 27 S. Ct., 37;

*Empire State-Idaho Mining Co. v. Hanley*, 205 U.  
 S., 225, 27 S. Ct., 476;

*Childers v. McClaghry*, 216 U. S., 139, 30 S. Ct.,  
 370.

The bill also contains allegations to the effect that complainant's constitutional rights were violated because under the charter and ordinance no opportunity was afforded complainant for a hearing upon the amount and apportionment of the benefits accruing from the improvement, and upon the valuation fixed by the city assessor upon complainant's



property. That these features of the assessment proceeding do not involve a violation of due process of law has been repeatedly held by the United States Supreme Court and the Supreme Court of Missouri; and under such circumstances such allegations do not raise a federal question.

The construction or application of the federal constitution must be *substantially* involved. It must *clearly and necessarily* be drawn in question.

*Goodrich v Ferris*, 214 U. S., 71, 29 S. Ct., 580;  
*O'Callaghan v O'Brien*, 199 U. S., 89, 25 S. Ct., 727;  
*Empire State-Idaho Mining Co. v Hanley*, 205 U. S.,  
 225, 27 S. Ct., 476.

And if the point raised has already been definitely passed upon by the courts, and the constitutionality sustained, the averments with reference to a violation of due process of law will not invoke the jurisdiction of the court.

*Brolan v. U. S.*, 236 U. S., 216, 35 S. Ct., 285;  
*Manhattan Life Ins. Co. v. Cohen*, 234 U. S., 123,  
 34 S. Ct., 874;  
*Knop v. Monogahela etc. Co.*, 211 U. S., 485, 29  
 S. Ct., 188.

There are also allegations that the tax bills in question are confiscatory. But the averments as to this point are not sufficient to raise a question under the 14th Amendment. In *American Sugar Refining Co. v. U. S.*, 211 U. S., 155, 29 S. Ct., 89, the court says:

"We concur with counsel for the government that, if the construction or application of the Constitution of

the United States, within the meaning of § 5, Act of 1891, is involved in every case where one claims that, according to his interpretation of a statute, excessive duty or tax has been demanded by executive officers, \* \* \* this court must entertain direct appeals from the circuit court in most tariff and tax controversies; which we regard as out of the question."

It would appear from these authorities that while the jurisdiction of the District Court may have been based by the bill solely upon the alleged constitutional question, no such question was actually involved so as to justify an appeal direct to this Court.

## VII.

Appellee has filed a motion to dismiss this appeal upon the ground that the Circuit Court of Appeals had no jurisdiction of it and that appellants are not entitled to the benefit of the Act of September 14, 1922. We submit that the Court of Appeals did have jurisdiction; that if so, the Act of September 14, 1922, does not apply; and that the case should therefore, be remanded to that court or retained here for determination as upon certificate from said Court of Appeals under Sections 239, 240 and 262 of the judicial Code.

If, however, this Court shall be of opinion that the Appeal was taken to the wrong court, then we contend that the terms of the Act of September 14, 1922, do apply, that they are valid and that under them this court should proceed to hear and determine the merits. Our contentions and au-

thorities on this point are contained in our memorandum filed in opposition to the motion to dsmiss therein.

Respectfully submitted,

JUSTIN D. BOWERSOCK,

ARTHUR MILLER,

SAM'L J. McCULLOCH,

FRANK P. BARKER,

G. V. HEAD,

*Attorneys for Appellants.*

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No. 168

Office Supreme

FILE

APR 14

WM. R. ST

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1922.

McMILLAN CONTRACTING COMPANY, A  
CORPORATION, AND FIDELITY  
NATIONAL BANK AND TRUST  
COMPANY OF KANSAS CITY,  
A CORPORATION,  
APPELLANTS,

VS.

B. HAYWOOD HAGERMAN, APPELLEE.

**APPELLEE'S BRIEF ON APPELLANTS'  
MOTION TO REMAND.**

ALBERT S. MARLEY,  
*Attorney for Appellee, B. Hay-*  
*wood Hagerman.*

**No. 737.**

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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1922.

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McMILLAN CONTRACTING COMPANY, A  
CORPORATION, AND FIDELITY  
NATIONAL BANK AND TRUST  
COMPANY OF KANSAS CITY,  
A CORPORATION,  
APPELLANTS,

VS.

B. HAYWOOD HAGERMAN, APPELLEE.

---

**STATEMENT.**

There is already on file in this court a "motion to dismiss appeal," filed by this appellee, B. Haywood Hagerman. The appellants McMillan Contracting Company and Fidelity National Bank and Trust Company of Kansas City, have filed their brief in opposition to said motion to dismiss appeal; and in addition thereto, have also filed a motion to remand the cause back to the United States Circuit Court of Appeals of the Eighth Circuit. We take it that both motions will be by this

court considered together, and for that reason will not set out in opposition to "appellants' motion to remand" to the United States Circuit Court of Appeals, of the Eighth Circuit, the points raised and authorities cited by appellee in his motion to dismiss appeal. It is apparent from the bill of complaint that either this court had sole and exclusive jurisdiction of the appeal allowable from the decree entered by the trial court on July 7th, 1921, or else the case is entirely without Federal jurisdiction, and the hearing of the case by the trial court, the transferring of the case to this court by the United States Circuit Court of Appeals of the Eighth Circuit, were all idle ceremony. It clearly appears from the record that the question of diverse citizenship or any other ground giving the Circuit Court of Appeals jurisdiction is not in the case; and that, unless the protection of the Fourteenth Amendment of the Constitution of the United States was properly invoked by the appellee's bill of complaint, there is no jurisdiction in any Federal court.

We will again set out portions of the bill of complaint set out in appellee's motion to dismiss filed in this cause as well as an additional paragraph therefrom.

Paragraph 3 of the bill of complaint reads as follows, to-wit:

"That the controversy herein arises under and involves, the construction of the Constitution of the United States and particularly the Fourteenth Amendment of said Constitution as hereinafter specifically shown."



Paragraph 12 of said bill of complaint reads as follows, to-wit:

"By the aforesaid special assessments it is attempted to put more than two-thirds of the costs of the aforesaid improvement which is most general in its nature and designed for all the people of Kansas City, upon the neighboring property holders (including the complainant) owning land north of the aforesaid improvement; and less than one-third of the cost of said improvement upon the neighboring property holders owning land lying south of said improvement. That the aforesaid benefit district lying north of the aforesaid improvement on the east end thereof extends north 1388 feet distant from the said improvement and on the west end of the said improvement extends 2196 feet distant north of said improvement, and on the west end thereof, extends only a distance of 225 feet south thereof, and on the east end thereof extends only a distance of 650 feet south of the said improvement; leaving owners of property at the east end of and on the south side of the said improvement at from a distance of from 725 feet to a distance of 1388 feet south from the said improvement, and the property owners at the west end of and south side of said improvement from a distance of from 225 feet to a distance of 2171 feet south of said improvement, all totally free, clear and exempt from bearing any part of the expense of said improvement, when the said lands so kept free and clear and exempt from said improvement received greater direct special benefits on account of said improvement, than the hereinbefore mentioned tract "A" owned by the complainant, against which the aforesaid assessments have been attempted to be made; that the improvements are as shown of the most general character and designed for all of the people of the said Kansas City. At present the said forty (40) acres of the complain-

ants are not accessible to said improvement and will not be accessible to improvement for years to come. It is manifestly an improvement of a general nature and taxes of a special nature are sought to be imposed for the payment thereof, as hereinafter shown, all of which is undertaken to be done under the provisions of the municipal charter of Kansas City hereinabove set out."

Paragraph 13 of the bill of complaint reads as follows, to-wit:

"That said ordinance No. 21831, and said assessment attempted to be made against said property of said complainant, and said tax bills attempted to be issued against said property of complainant, were and are unconstitutional, null and void, for the reason that they and each of them if enforced, will deprive complainant of his property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States; in that the said property although located a great distance from said boulevard, is, pursuant to said ordinance and said assessments, sought to be charged with the same benefits, and in the same proportion as property immediately abutting upon said boulevard, and which is necessarily specially benefited greatly in excess of all property which does not adjoin and abut upon said boulevard and especially property located as that of complainant at a great distance from said boulevard, thereby depriving complainant of the equal protection of the law in violation of Section 1 of Fourteenth Amendment to the Constitution of the United States; in that said Section 28 of Article VIII, and said ordinance and said proceedings hereinabove referred to, do not, and did not, provide, give or grant to this complainant, or his predecessor in title, any opportunity to be heard as to the apportionment of the benefits resulting from

the cost of said grading among the various tracts of property in the benefit district, and complainant's predecessor in title and complainant had no notice or opportunity to be heard in relation to the value at which their property was assessed by the city assessor, nor as to the amount of benefits, if any, accruing to it, by reason of said improvements, but that said section of said charter and said ordinance provide for an arbitrary and unfair and discriminating method of apportionment as hereinbefore shown, all of which is violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States as hereinabove set forth; and for the further reason that no suit or proceeding was instituted in the Circuit Court against the respective owners of the land to be charged with the cost of said work or against this complainant, as required by said charter and by said ordinance as aforesaid."

Paragraph 14 of the bill of complaint reads as follows, to-wit:

"Complainant further states that the pretended benefit district described in and fixed by said ordinance of Kansas City, No. 21831, was unreasonable, discriminating, arbitrary, and unjust, and was such as to place an unconscionable burden and inequitable proportion of the cost of said work, upon the land of complainant; a large amount of land, including the said tract of complainant, lying a long distance north of and not abutting or nearly approaching said Meyer Boulevard, and not especially benefited by the grading of Meyer Boulevard, was included within said benefit district while a large amount of land east and south of said Meyer Boulevard particularly and peculiarly and obviously benefited by the grading of said Meyer Boulevard was left wholly out of said benefit district and was not assessed at all for such grading. Complainant fur-

ther states that the benefit district described in said Ordinance No. 21831, was limited and confined to a relatively small territory, thereby fixing the improvement of Meyer Boulevard in question as one of a purely local nature and benefit, while, as a matter of fact, the improvement was not of a local nature, but was designated to be and is of a general nature and for the general public benefit, as aforesaid. Said Meyer Boulevard is not, in fact, a street or boulevard, but is, in fact, a great and broad parkway varying from two hundred twenty (220) to five hundred (500) feet in width, and it is not appropriate, necessary or useful to, nor a peculiar local benefit to, the lands abutting on it or adjacent thereto, or to the lands in said benefit district, the same being unimproved, unplatted suburban lands, as aforesaid. And, although said Meyer Parkway is primarily and obviously a benefit to said Swope Park, and to the general public, neither said park lands were assessed anything toward the cost of said grading, although said park lands might, under the charter of Kansas City, have legally been so assessed, nor did the city or general public otherwise contribute or pay any part of the cost of said grading, although such is contemplated by the charter of Kansas City."

Paragraph 15 of the bill of complaint reads as follows, to-wit:

"Complainant further alleges it is an obvious, palpable fact that the owners and occupants of the land lying north of said boulevard, and toward the center of the city, will have practically no use of nor benefit from said boulevard, while the owners and occupants of the land south of said boulevard will have some use of said boulevard as an approach to and from the center of the city. And, notwithstanding the obvious fact that the land north of said boulevard has less use of and less bene-

fit from said Meyer Boulevard than the land on the south, the land north of said boulevard was assessed over seventy-one thousand dollars (\$71,000.00), or about 73 per cent of the cost of the grading said boulevard, while the land south of said boulevard was assessed only about twenty-six thousand (\$26,000.00) dollars or only 27 per cent of the cost of grading said boulevard."

Paragraph 16 of the bill of complaint reads as follows, to-wit:

"Complainant further states that all the land in said benefit district fixed by said ordinance No. 21831, is unplatted and unimproved suburban land, there being no house or other improvement fronting on said boulevard and no house or other edifice, except one, in the entire benefit district. The lands in said benefit district are purely acre properties, and are of small value, and the lands that do not abut on said Meyer Boulevard (and such is the land of complainant), were assessed by the city assessor, as aforesaid, for the purpose of this proceeding, equally as high or higher per acre than the lands abutting upon the boulevard and the apportionment of the assessment of the said cost of grading Meyer Boulevard was land ratably over the lands in said benefit district according to the said assessed value, the result being that lands far removed, much of it more than one-fourth of a mile distant from and north of said Meyer Boulevard, were taxed for said grading, per acre equally with or greater than the land abutting on said boulevard. None of the lands in the benefit district were laid off into lots and blocks, and so it is true that the land abutting and adjacent to the said boulevard and extending back therefrom to a depth of one hundred fifty (150) feet, which according to Section 3 of Article VIII of the Charter of Kansas

City, should be deemed as the land abutting upon a boulevard and be chargeable with grading costs, was assessed with but approximately twelve thousand (\$12,000.00) dollars or only about 12 per cent of the cost of said grading, while the lands in the benefit district that do not abut on said boulevard or lie within one hundred fifty feet thereof and are but little, if at all, specially benefited by said grading, were assessed with about eighty-five thousand (\$85,000.00) dollars or about 88 per cent of the cost of said grading, and thus the land of complainant lying far removed from said boulevard is taxed more than the aggregate of all lands abutting thereon, although no greater in area."

Paragraph 18 of the bill of complaint reads as follows, to-wit:

"Complainant states that his said land was assessed in a purely arbitrary, unjust and discriminatory manner, and not in accordance with or in consideration of the benefits to said lands by reason of said improvements and that the assessments made and tax bills issued against his said land are far in excess of the special benefits, if any, accruing to his land, by reason of such grading, and are so great as to amount to a confiscation of complainant's land."

Paragraph 19 of the bill of complaint reads as follows, to-wit:

"That by Section 28 of Article VIII of Charter of Kansas City, Jackson County, Missouri and said Ordinance 21831, said assessments attempted to be made against said property of complainant and said tax bills attempted to be issued against said property of complainant, were and are unconstitutional, null and void, for the reason that, they

and each of them, if enforced will deprive complainant of his property in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States; in that the said property of complainant although located a great distance from said boulevard, is, pursuant to said section of said charter and said ordinance and said assessments sought to be charged with benefits, while property lying south of that said improvement and nearer than complainant's said property to the said improvement as hereinbefore shown, and therefore necessarily benefited greatly in excess of the aforesaid property owned by the plaintiff, is not charged with any part of the cost of the said improvement and thereby the complainant is deprived of the equal protection of the law of Missouri in violation of Section 1 of Fourteenth Amendment of the Constitution of the United States; the said Section 28 of Article VIII and said ordinance and said proceedings hereinbefore referred to did not provide for giving or granting to this complainant or his grantor, any opportunity to be heard as to the apportionment of the benefits resulting from the cost of said grading, as to the fact that complainant was being deprived of the equal protection of the laws of Missouri, as to the fact that complainant was being discriminated against, as hereinbefore shown in the making and levying of the special benefits to be collected for the payment of the cost of the aforesaid improvement; but the said section of the said charter and said ordinance provided for an arbitrary, unfair and discriminating method of apportionment, all of which was, and is violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States and the complainant and his grantor had no notice of or opportunity to be heard in relation to, the discrimination against complainant's property as herein before shown, all in violation of said Section 1 of said Fourteenth Amendment."

### SUGGESTIONS.

We believe that the foregoing paragraphs, from appellee's bill of complaint, clearly show that at the outset it was the specific intention of the appellee to invoke and rely exclusively as to jurisdiction upon the Fourteenth Amendment of the Constitution of the United States. Such being the fact, it clearly appears from the authorities cited by the appellee in his motion to dismiss appeal that it was his invocation of the Constitution of the United States, that gave the trial court its jurisdiction to grant the decree entered of record on July 7th, 1921. It has not been contended by the appellants and neither has it been shown by them, that the jurisdiction of the Federal Court was invoked on any other ground, and applying the test laid down by this court, in *St. Anthony's Church v. Pennsylvania R. R. Co.*, 237 U. S. page 577, as follows, to-wit:

"In other words, the inquiry as to whether if the averments in the complaint of diversity of citizenship are disregarded, there would yet remain in the complaint such averments as to the existence of rights under the constitution and laws of the United States as would be adequate to sustain jurisdiction."

it would clearly appear, that eliminating from appellee's bill of complaint and disregarding, his invocation of the federal constitution as a shield, there would be nothing upon which to base any federal jurisdiction.



The construction and application of the Fourteenth Amendment of the Constitution of the United States giving the trial court original and this court appellate jurisdiction, then this court on an appeal, when properly taken, within the time fixed by the statutes of the United States would have the right to review every question, state as well as federal, disclosed by the record. In the case of *Southern R. R. Co. v. Watts*, 43 U. S. S. C. R. 194, this court has said:

"Many of the objections made, raise questions as to the meaning and effect of recent statutes of the state which have not been construed by its courts; and we are reluctant to pass upon these questions. Some of the objections raised questions of facts on which the evidence is submitted by affidavit, and is in certain respects conflicting. But in all the cases, jurisdiction rests upon substantial federal questions. The objections to the validity of the legislation and of the assessments, whether arising out of the federal constitution or out of the constitution or statutes of the state, may be presented in a single suit. We must therefore determine the state as well as the federal questions; *Mich. Central R. R. v. Powers*, 201 U. S. 245; *Greene v. Louisville and Interurban Railroad*, 244 U. S. 499; *Davis v. Wallace*, 257 U. S. 478."

We feel that it clearly appears, from the authorities cited in this brief and in appellee's motion to dismiss appeal, there is nothing in the record that could possibly be construed as giving United States Circuit Court of Appeals of the Eighth Circuit any jurisdiction whatsoever, and as there can be but one appeal the appellants' motion to remand this cause to the United States Circuit

Court of Appeals of the Eighth Circuit should be overruled and appellee's motion to dismiss appeal sustained.

Respectfully submitted,

ALBERT S. MARLEY,  
*Attorney for Appellee, B. Hay-*  
*wood Hagerman.*

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1923.

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McMILLAN CONTRACTING COM-  
PANY, a corporation, and FIDEL-  
ITY NATIONAL BANK AND  
TRUST COMPANY OF KANSAS  
CITY, a corporation,

*Appellants*

v.

No. 168

B. HAYWOOD HAGERMAN,

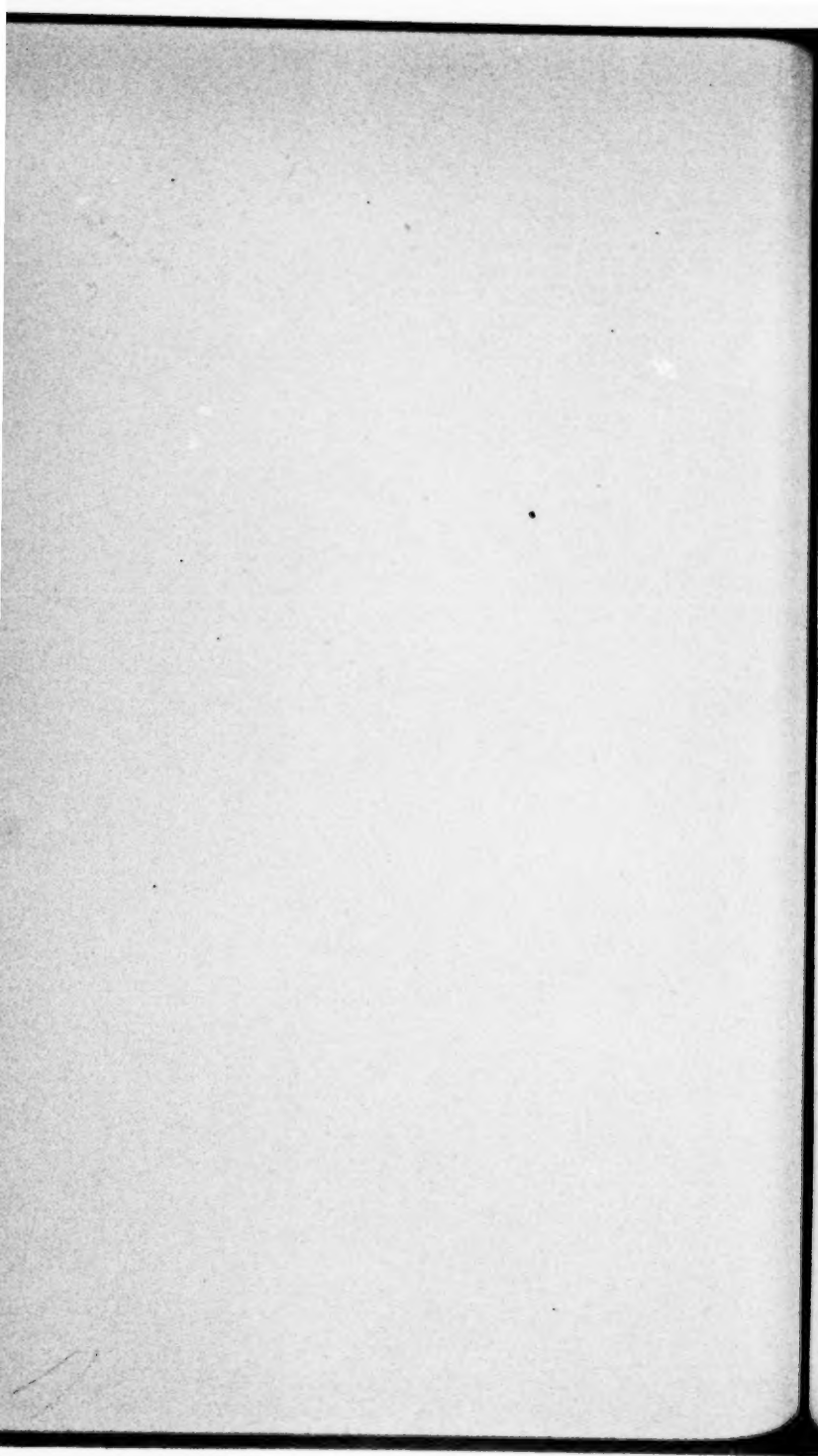
*Appellee.*

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**Appellants' Supplemental Brief on Motion  
to Dismiss.**

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JUSTIN D. BOWERSOCK,  
ARTHUR MILLER,  
SAM'L J. McCULLOCH,  
FRANK P. BARKER,  
G. V. HEAD,  
*Attorneys for Appellants.*



IN THE  
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OCTOBER TERM, 1923.

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McMILLAN CONTRACTING COM-  
PANY, a corporation, and FIDEL-  
ITY NATIONAL BANK AND  
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*Appellants*

v.

No. 168

B. HAYWOOD HAGERMAN,

*Appellee.*

---

**Appellants' Supplemental Brief on Motion  
to Dismiss.**

Since the filing of Appellants' brief on the motion to dismiss, there have been certain decisions of this court and of the Circuit Courts of Appeals construing the statute of September 14, 1922, amending the judicial code by adding thereto Section 238a. Appellants respectfully pray leave of the Court to submit this supplemental brief referring to these additional authorities.

In the case of *Pothier v. Rodman*, decided by this Court on March 12, 1923, and reported in 43 S. Ct. 374, this court entered an order transferring said case to the Circuit Court of Appeals for the First Circuit, pursuant to the Act of September 14, 1922. The appeal in the case had been taken from the District Court for the District of Rhode Island direct to this Court when it should have gone to the Circuit Court of Appeals for the First Circuit.

The case of *Wagner Electric Mfg. Co. v. Lyndon*, decided by this Court on May 21, 1923, and reported in 43 S. Ct. 589, is of particular importance. The Wagner Company brought suit in the United States District Court for the Eastern Division of Missouri against Lyndon and the Sheriff of the City of St. Louis, seeking to enjoin the Sheriff from paying over to Lyndon certain money collected by the Sheriff on a judgment rendered in the State Court against the Wagner Company. The District Court, on the 1st day of August, 1921, dismissed the bill on the ground that no Federal question was raised. The Wagner Company appealed to the Circuit Court of Appeals on the 17th day of October, 1921, which Court affirmed the decree of the District Court on July 7, 1922. A petition for rehearing was filed, which was denied by the Circuit Court of Appeals on September 18, 1922. The Wagner Com-

pany then appealed from the decision of the Circuit Court of Appeals to this Court.

This Court decided that an appeal from the decision of the District Court lay only to this Court and not to the Circuit Court of Appeals, and that but for the Act of September 14, 1922, it would be the duty of this Court to reverse the decree of the Circuit Court of Appeals with directions to dismiss the appeal; but this Court retained jurisdiction of the case and decided the same on the merits pursuant to Section 238a. Chief Justice Taft in rendering the opinion of the Court, discussed the effect of the Act as follows:

“The decree of affirmance in the Circuit Court of Appeals was entered on July 7, 1922, but a petition for rehearing was filed, and that petition was not denied until September 18, 1922, or four days after the passage of the foregoing act. Before the decree of affirmance became finally the act of the Circuit Court of Appeals, this law came into force, and, however that may be, it is in force now to govern us in the direction which we, in reversing the decree of affirmance, should give to that court. That direction should be to transfer the case to this court, to which it should have been brought by direct appeal from the District Court, under section 238 of the Judicial Code.

The case is here on appeal allowed by a judge of the Circuit Court of Appeals. The case has been submitted to us on the motion to dismiss or affirm, which is a hearing on the merits. All parties have filed briefs. Is it necessary for us to go through the idle form of remanding it to the Circuit Court of Appeals, to enable that court to transfer it back to us for a second consideration? Certainly such unnecessary consumption of time and labor is not in the spirit of the Act of September 14, 1922. Having the case here, and having heard it on the merits, we think we may properly consider that done which ought to have been done, treat the case as here by appeal from the District Court, and dispose of it, as we would do if the Circuit Court of Appeals had formally transferred it to us."

This decision seems to put at rest all the objections urged by the Appellees to the application of the Act of September 14, 1922, to the present case.

In the case of *Hoffman v. McClelland*, 284 Fed. 837, the Circuit Court of Appeals for the Fifth Circuit transferred to this Court under the Act of September 14, 1922, a case appealed to the Circuit Court of Appeals, of which only this Court had appellate jurisdiction.



In the case of *Bianchi v. Morales*, 288 Fed. 194, a similar transfer was made by the Circuit Court of Appeals for the First Circuit.

The Circuit Court of Appeals for the Fifth Circuit applied the Act in a similar manner in the case of *McLean Oil Company v. Ashworth Heirs*, 289 Fed. 73.

Respectfully submitted,

JUSTIN D. BOWERSOCK,  
ARTHUR MILLER,  
SAM'L J. McCULLOCH,  
FRANK P. BARKER,  
G. V. HEAD,  
*Attorneys for Appellants.*

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IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1923

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McMILLAN CONTRACTING COMPANY  
AND FIDELITY NATIONAL BANK &  
TRUST COMPANY OF KANSAS CITY,  
*Appellants,*

v.

No.

B. HAYWOOD HAGERMAN,  
*Appellee.*

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE WESTERN DISTRICT OF MISSOURI, TRANSFERRED FROM THE  
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH  
CIRCUIT.

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**Brief on Behalf of Appellants.**

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**STATEMENT.**

This is a suit to cancel and set aside certain tax bills issued by Kansas City, Missouri, and to have complaintants' land adjudged free of any liens on account thereof. The tax bills, purported to be issued under the authority of the

charter of Kansas City and in accordance with the provisions of said charter, and particularly Section 28 of Article VIII thereof, for the grading of Meyer Boulevard in said city.

The bill alleges four distinct grounds for holding the tax bills void: *first*, that Section 28 of Article VIII of the charter of Kansas City, Ordinance No. 21831 (providing for the grading of said boulevard) and all proceedings thereunder are in violation of the Constitution of the United States (Trans. 12-13); *second*, that the charter and ordinance were not complied with, in that a certain suit required therein to be filed was not filed (Trans. 9-10); and *third*, that said Section 28 was violated in the issuance of the bills, in that the tax bills were not levied in proportion to the benefits accruing to the several parcels of land (Trans. 15).

The answers denied all these violations. They alleged further that the suit required by the charter and ordinance had been filed and that the judgment therein was *res judicata* of all questions of fact raised by the bill (Trans. 19-20).

The District Court set the tax bills aside, the decree specifying no particular ground for such action (Trans. 21). The opinion filed by the District Judge indicates that he determined the case upon the ground that the benefit district and the assessment were arbitrary and unreasonable. (Trans. 126-133). From this decree, an appeal was duly prosecuted to the United States Circuit Court of Appeals for the Eighth Circuit (Trans. 22-26), and by that court the case was transferred here pursuant to Section 238A of the Judicial Code (Trans. 136).

The portion of Meyer Boulevard graded under these proceedings forms an approach to the entrance of Swope Park, one of the large parks of Kansas City. It connects the park with the boulevard system. As its name implies,

it is a broad avenue or parkway, varying from 220 to 500 feet in width. It has two paved driveways with spaces for flowers and planting both between and outside the driveways. In order to make it an adequate and imposing approach to the great park, it was graded in a substantial plane throughout the portion involved in these proceedings, and for this reason, it was deemed by the city authorities too large an undertaking to be paid for in the usual charter method of assessing the cost of grading, i. e., an assessment against the abutting property only. It was, therefore, determined to assess the cost against a larger benefit district provided for in Section 28 of Article VIII of the Kansas City Charter, hereinafter set out, a section adopted to relieve abutting property in cases of unusually burdensome grading.

For this purpose, the proper authorities established a benefit district extending along both sides of the proposed boulevard for the full length of the portion to be graded and in width from 63rd Street on the north to 67th Street on the south. The boulevard runs a somewhat irregular course, averaging 500 to 600 feet south of the east-and-west center line of this district, which is a broad, open area. North of 63rd Street, the land is platted and considerably occupied with residences, and is served by 63rd Street and other streets northward into the city. South of 65th Street the land slopes rapidly to the south, is platted into small residence lots and is of a character to be served rather by street cars than by automobiles and other vehicles. The benefit district is unplatted and, therefore, better adapted to development as boulevard property. It is some six miles from the business center, is high and slightly and is very desirable for residence purposes.

Prior to letting the contract for the grading, a suit was filed in the Circuit Court of Jackson County by the city against the owners of the respective tracts in the benefit district to determine the validity of the proceedings, the propriety of the benefit district and the inclusion and exclusion of lands therein and therefrom. Service was had by publication against such owners in accordance with the charter provision; a trial was had; the district approved the proceedings and no appeal taken.

In reliance on this judgment, the contract was let, the work done, the benefit assessed and the tax bills issued, all in due and legal manner, unless some one or more of the objections urged thereto by appellee be held to invalidate the bills.

The facts bearing upon each of the contested points will be further referred to in connection with such points respectively.

### SPECIFICATION OF ERRORS.

1. The court erred in not finding and holding that the provisions of Section 28 of Article 8 of the Charter of Kansas City, Missouri, had been complied with in the matter of the suit required by that Section to be filed in the Circuit Court of Jackson County, Missouri, and in all other matters required by that Section.
2. The court erred in not finding and holding that the judgment in the suit filed in the Circuit Court of Jackson County, Missouri, under the provisions of said Section 28, was and is *res judicata* as to the propriety and reasonableness of the benefit district fixed by Ordinance Number 21831, as to the method of apportionment and as to all other matters that were or might have been litigated therein.
3. The court erred in ruling that the benefit district was arbitrary and unreasonable.
4. The court erred in ruling that the assessment was arbitrary and unreasonable.
5. The court erred in holding that the tax bills involved in this action exceeded the special benefits received by the lands in question.
6. The court erred in holding that the tax bills unreasonably exceeded the benefit, or any possible benefit to the lands in question.
7. The court erred in holding that the improvement in question was in its nature a general public improvement, rather than a local improvement.

8. The court erred in holding that the method of apportionment within the benefit district was arbitrary and unreasonable.

9. The court erred in decreeing that the tax bills were null and void and that the land in question be released from said tax bills.

10. The court erred in making any finding as to the relation between the amount of the tax bills in question and the values of the lands in controversy, for the reason that there was no competent evidence as to such values.

11. The court erred in holding the amounts of the tax bills in question to be unreasonable or confiscatory for the reason that there was no competent evidence as to the values of the lands in controversy.

12. The court erred in making any finding as to the extent of the special benefits received by the respective tracts for the reason that there was no competent evidence as to such benefits, and erred in admitting any evidence on that issue.

13. The court erred in determining the validity of the tax bills in question upon the relation between the amount of each tax bill and the extent of the special benefit to the respective tract covered by such bill.

## POINTS AND AUTHORITIES.

## I.

**Section 28 of Article VIII of the Kansas City Charter does not violate the Constitution of the United States.**

- West v. Burke*, 286 Mo., 358, 228 S. W., 775;  
*Nichols v. Kansas City*, 291 Mo., 690, 237 S. W., 107;  
*Embree v. Kansas City and Liberty Boulevard Road District*, 240 U. S. 242, 36 S. Ct. 317, affirming 257 Mo., 593;  
*Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 17 S. Ct., 56;  
*Hagar v. Reclamation District*, 111 U. S., 701, 4 S. Ct., 663;  
*Houck v. Little River Drainage District*, 239 U. S., 254, 36 S. Ct., 58;  
*Saxton National Bank v. Carswell*, 126 Mo., 436, 29 S. W., 279;  
*Corrigan v. Kansas City*, 211 Mo., 608, 111 S. W., 115;  
*Ross v. Gates*, 183 Mo., 338, 81 S. W., 1109;  
*French v. Barber Asphalt Paving Co.*, 181 U. S., 324, 21 S. Ct., 625;  
*McGhee v. Walsh*, 249 Mo., 266, 155 S. W., 445;  
*Heman v. Allen*, 156 Mo., 534, affirmed 181 U. S., 402, 21 S. Ct., 645;  
*Wagner v. Baltimore*, 239 U. S., 207, 36 S. Ct., 66;  
*Wagner v. Leser*, 239 U. S., 207, 36 S. Ct., 66;  
*Parsons v. District of Columbia*, 170 U. S., 45, 18 S. Ct., 521;



*Tonawanda v. Lyon*, 181 U. S., 389, 21 S. Ct., 609;  
*Construction Co. v. Shovel Co.*, 211 Mo., 524, 111  
 S. W., 86.

## II.

**Ordinance No. 21831, providing for the grading of Meyer Boulevard, does not violate the United States Constitution.**

*Naylor v. Harrisonville*, 207 Mo., 341, 105 S. W.,  
 1074;

*Heman v. Allen*, 156 Mo. 534, affirmed as *Shumate  
 v. Heman*, 181 U. S., 402, 21 S. Ct., 645;

*Williams v. Eggleston*, 170 U. S., 304, 18 S. Ct.,  
 617;

*Nichols v. Kansas City*, 291 Mo., 690, 237 S. W.,  
 107;

*Spencer v. Merchant*, 125 U. S., 345, 8 S. Ct., 921;

*Brougham v. Kansas City*, 263 Fed., 115;

*Carson v. Sewer Commissioners*, 182 U. S., 398, 21  
 S. Ct., 860;

*Fallbrook Irrigation Co. v. Bradley*, 164 U. S., 112,  
 17 S. Ct., 56;

**(a) The grading of Meyer Boulevard is an improvement of such a nature that its cost may lawfully be charged against a local benefit district.**

*Kansas City v. Bacon*, 147 Mo., 259, 48 S. W., 860;

*Kansas City v. Bacon*, 157 Mo., 450, 57 S. W., 1075;

*French v. Barber Asphalt Paving Co.*, 181 U. S.,  
 324, 21 S. Ct., 625;

**(b) The benefit district was not fixed arbitrarily.**

- Barber Asphalt Paving Co. v. French*, 158 Mo., 534, 58 S. W., 934;
- Chadwick v. Kelley*, 187 U. S., 540, 23 S. Ct., 175;
- McGhee v. Walsh*, 249 Mo., 266, 155 S. W., 445;
- Heman v. Schulte*, 166 Mo., 409, 66 S. W., 163;
- Keith v. Bingham*, 100 Mo., 300, 13 S. W., 89;
- Louisville & Nashville R. R. v. Barber Asphalt Paving Co.*, 197 U. S., 430, 25 S. Ct., 466;
- Kansas City v. Ward*, 134 Mo., 172, 35 S. W., 600;
- Bauman v. Ross*, 167 U. S., 548, 17 S. Ct., 966;
- French v. Barber Asphalt Paving Co.*, 181 U. S., 324, 21 S. Ct., 625;
- Houck v. Little River Drainage District*, 239 U. S., 254, 36 S. Ct., 58;
- Kansas City v. Bacon*, 147 Mo., 259, 48 S. W., 860;
- Corrigan v. Kansas City*, 211 Mo., 608, 111 S. W., 115;
- Kansas City Grading Co. v. Holden*, 107 Mo., 305, 17 S. W., 798;
- Mullins v. Cemetery Assn.*, 268 Mo., 691, 187 S. W., 1169;
- Northern Pacific R. R. v. Seattle*, 46 Wash., 674, 91 Pac., 244;
- Construction Co. v. Shovel Co.*, 211 Mo., 524, 111 S. W., 86;
- Voris v. Pittsburgh Plate Glass Co.*, 163 Ind., 599, 70 N. E., 249;

(c) That a larger district was assessed with the cost of condemning land for the boulevard is immaterial.

*Houch v. Little River Drainage District*, 239 U. S. 254, 36 S. Ct., 58.

(d) That property not abutting on the improvement cannot be benefited as much as abutting property is immaterial.

*Embree v. Kansas City and Liberty Road District*, 240 U. S., 242, 36 S. Ct., 317;

*Kansas City v. Bacon*, 147 Mo., 259, 48 S. W., 860;

*Kansas City v. Bacon*, 157 Mo., 450, 57 S. W., 1075;

*Walston v. Nevin*, 128 U. S., 578, 9 S. Ct., 192;

*Spencer v. Merchant*, 125 U. S., 345, 8 S. Ct., 921;

*Bauman v. Ross*, 167 U. S., 548, 17 S. Ct., 966.

### III.

The proceedings subsequent to the ordinance do not violate the Constitution of the United States.

*Parsons v. District of Columbia*, 170 U. S., 45, 18 S. Ct., 521;

*Hagar v. Reclamation District*, 111 U. S., 701, 4 S. Ct., 663;

*Voigt v. Detroit*, 184 U. S., 115, 22 S. Ct., 337;

*Wight v. Davidson*, 181 U. S., 371, 21 S. Ct., 616;

*Pittsburg R. R. v. Board of Public Works*, 172 U. S., 32, 19 S. Ct., 90;

*In re Amsterdam*, 126 N. Y., 158, 27 N. E., 272;

- Walston v. Nevin*, 128 U. S., 578, 9 S. Ct., 192;  
*Embree v. Kansas City and Liberty Boulevard Road District*, 240 U. S., 242, 36 S. Ct., 317;  
*Winona & St. Paul Land Co. v. Minnesota*, 159 U. S., 526, 16 S. Ct., 83;  
*St. Louis v. Richeson*, 76 Mo., 470;  
*King v. Portland*, 184 U. S., 61, 22 S. Ct., 290;  
*Neil v. Ridge*, 220 Mo., 233, 119 S. W., 619;  
*First National Bank v. Nelson*, 64 Mo., 418;  
*Nichols v. Kansas City*, 291 Mo., 690, 237 S. W., 170;  
*Saxton National Bank v. Carswell*, 126 Mo., 436, 29 S. W., 152;  
*Weyerhaeuser v. Minnesota*, 176 U. S., 550, 20 S. Ct., 485;  
*Kentucky Railroad Tax Cases*, 115 U. S., 321, 6 S. Ct., 57;  
*Wells Fargo & Co. v. Nevada*, 248 U. S., 165, 39 S. Ct., 62;  
*Kansas City v. Huling*, 87 Mo., 203;  
*Barnes v. Pikey*, 239 Mo., 398, 196 S. W. 883.

## IV.

**There was no testimony of excessive valuation, or of discrimination in valuation, or of any value at all.**

- 22 Corpus Juris, 178, Sec. 122.  
 13 Ency. of Evi., 454.  
*Girard Trust Co. v. Philadelphia*, 248 Pa., 179, 93 Atl., 947;  
*Wayland v. Seattle*, 96 Wash., 344, 165 Pac., 113;

- Marine Coal Co. v. Pittsburgh M. & Y. R. R. Co.*,  
246 Pa., 478, 92 Atl., 688;  
*Hildreth v. City of Longmont*, 47 Col., 79, 105 Pac.,  
107;  
*Baltimore v. Carol*, 128 Md., 68, 96 Atl., 1076;  
*Suffolk & C. Ry. Co. v. West End Land Co.*, 137  
N. C., 330, 49 S. E., 350;  
*Fort Collins Dev. Co. v. France*, 41 Col., 512, 92  
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*Savannah Ry. v. Bufford*, 106 Ala., 303, 17 So.,  
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*St. Louis I. M. & S. Ry. Co. v. Magness*, 93 Ark.,  
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*Denver & R. G. R. Co., v. Heckman*, 45 Col., 470,  
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*Kelly v. Peoples Nat. F. I. Co.*, 262 Ill., 158, 104  
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*Martin v. N. Y. & N. E. Ry. Co.*, 62 Conn., 331, 25  
Atl., 239;  
*Hamilton v. Seaboard Air Line*, 150 N. C., 193, 63  
S. E., 730;  
Rev. St. Mo., 1919, Sections 13, 150, 13, 154.

## V.

Even if it be established by competent evidence that the tax bills against complainants' lands exceed the special benefit thereto, such fact would not be sufficient to invalidate the tax bills.

- St. Louis v. Brewing Co.*, 96 Mo., 677, 10 S. W.,  
477;  
*Michael v. St. Louis*, 112 Mo., 610, 20 S. W., 666;

*St. Louis v. Ranken*, 96 Mo., 497, 9 S. W., 910;  
*Chadwick v. Kelley*, 187 U. S., 540, 23 S. Ct., 175;  
*Prior v. Construction Co.*, 170 Mo., 439, 71 S. W.,  
 205;  
*Heman Construction Co. v. Wabash R. R.*, 206 Mo.,  
 172, 104 S. W., 67.

## VI.

**The suit in the Circuit Court of Jackson County complies with the provisions of the charter and ordinances and comports with due process of law.**

### **A. The suit complies with the charter and ordinances.**

Sec. 24, of Art. VIII, Charter of Kansas City;  
*Collins v. Jaicks*, 279 Mo., 404, 214 S. W., 397.

#### **(1). The proceeding is in the name of the city.**

*State v. Patton*, 42 Mo., 530;  
*Livingston v. Coe*, 4 Neb., 379;  
*Beattie v. Lett*, 28 Mo., 596;  
*Ammerman v. Crosby*, 26 Ind., 451;  
*Smith v. Watson*, 28 Ia., 218;  
*In re Clary's Estate*, 112 Cal., 292, 44 Pac., 569;  
*Kansas City v. Mastin*, 169 Mo., 80, 68 S. W., 1037.

#### **(2). The proceeding is against the respective land owners.**

*Goodrich v. Detroit*, 184 U. S., 432, 22 S. Ct., 397;

*Jackson v. Waterway District*, 85 Wash., 301, 147 Pac., 1140;

*Reed v. Cedar Rapids*, 137 Ia., 107, 111 N. W., 1013;

*Black v. McGonigle*, 103 Mo., 192, 16 S. W., 615;

*State ex rel. v. Lundquist*, 103 Wash., 339, 174 Pac., 440;

*Lingo v. Burford*, 112 Mo., 149, 20 S. W., 459;

*Nemally v. Joest*, 74 Ind., 409;

*Fitzgerald v. De Soto Special Road District*, 195 S. W., 695, (Mo.).

**B. Even if the suit was defective, the defects are not fatal since the suit is not necessary to due process.**

*Saxton National Bank v. Carswell*, 126 Mo., 436, 29 S. W., 152;

*Voight v. Detroit*, 184 U. S., 115, 22 S. Ct., 337;

*Paulsen v. Portland*, 149 U. S., 30, 13 S. Ct., 750;

*Walston v. Nevin*, 128 U. S., 578, 9 S. Ct., 192.

**C. The suit comports with due process of law.**

*Kansas City v. Duncan*, 135 Mo., 571, 37 S. W., 624;

*Kansas City v. Ward*, 134 Mo., 172, 35 S. W., 600;

*Kansas City v. Mastin*, 169 Mo., 80, 68 S. W., 1037;

*Lent v. Tullson*, 140 U. S., 316, 11 S. Ct., 825;

*State v. Blair*, 245 Mo., 680, 151 S. W., 148;

*State ex rel. v. Wilson*, 216 Mo., 215, 115 S. W., 549;

- Doris v. Pittsburgh Plate Glass Co.*, 163 Ind., 599,  
70 N. E., 249;  
*Cleveland Ry. Co. v. Porter*, 210 U. S., 177, 28 S.  
Ct., 647.

## VII.

The suit in the Circuit Court finally determined all questions raised or involved therein, and all such questions are now *res judicata*.

- Muskra v. U. S.*, 219 U. S., 346, 31 S. Ct., 250;  
*State ex rel. v. Westport*, 135 Mo., 120, 36 S. W.,  
663;  
*Tregea v. Modesto Irrigation District*, 164 U. S.,  
179, 17 S. Ct., 52;  
*Gibler v. Mattoon*, 167 Ill., 18, 47 N. E., 319;  
*Morgan Creek Drainage Dist. v. Hawley*, 255 Ill.,  
34, 99 N. E., 68;  
*People v. Linda Vista Irrigation Dist.*, 128 Cal.,  
477, 61 Pac., 86;  
*Rialto Irrigation Dist. v. Brandon*, 103 Cal., 384,  
37 Pac., 484;  
*In re Union Railway Co.*, 112 N. Y., 61, 19 N. E.,  
664;  
*Gelston v. Hoyt*, 3 Wheaton, 246;  
*Meriwether v. Block*, 31 Mo. App., 170;  
*First Nat. Bk. v. McCaskill*, 174 N. C., 362, 93 S.  
E., 905;  
*Christianson v. King County*, 239 U. S., 356, 36  
S. C., 114;



*St. Louis v. United Rys.*, 263 Mo., 387, 174 S. W., 78;

*Spratt v. Early*, 199 Mo., 491, 97 S. W., 925;

*Little River Drainage District v. Railroad*, 236 Mo., 94, 139 S. W., 330;

*McGhee v. Walsh*, 249 Mo., 266, 155 S. W., 445.

### VIII.

Since the trial and judgment in this case, the Supreme Court of Missouri has decided a case involving the questions raised in this case.

*Schmelzer v. Kansas City*, 295 Mo., 322, 243 S. W., 946;

*Forsyth v. Hammond*, 166 U. S., 506, 17 S. Ct., 665;

*Wade v. Travis Co.*, 174 U. S., 499, 19 S. Ct., 887;

*Mo. etc. R. Co. v. Cade*, 233 U. S., 642, 34 S. Ct., 678;

*Quinette v. Pullman Co.*, (C. C. A. 8th Cir.) 229 Fed., 333, 143 C. C. A., 453;

*Thomas Cusack Co. v. Chicago*, 242 U. S., 526, 37 S. Ct., 190;

*St. Louis etc. R. Co. v. Quinette*, (C. C. A. 8th Cir.) 251 Fed., 773, 164 C. C. A., 7.

## **BRIEF OF THE ARGUMENT.**

The charge that the charter, ordinance and proceedings thereunder are in violation of the United States Constitution naturally falls into three parts: first, the constitutionality of the charter provisions; second, the constitutionality of the ordinance; and third, the constitutionality of the proceedings thereunder. Of these in order.

### **I.**

**Section 28 of Article VIII of the Kansas City Charter does not violate the Constitution of the United States.**

The usual procedure for grading streets, avenues and public highways of every character is laid down in Section 3 of Article VIII of the charter (Trans. 30-34). This section provides that the cost of all grading shall be charged as a special tax on all lands on both sides of the highway graded. If the land is laid off into blocks, the assessment goes to the center of the block whether fronting on the highway or not (or to the alley only, if the council so prescribe by ordinance). If not laid off into blocks, then the assessment goes back one hundred fifty feet. The assessment is according to the value, exclusive of improvements (Trans. 33). A special assessment of the value is made by the City Assessor (Trans. 33).

Substantially the same procedure has been in force in Kansas City since 1889. Charter of Kansas City, 1889,

Art. IX, Sec. 5. Its validity had been thoroughly established.

*West v. Burke*, 286 Mo., 358, 228 S. W., 775;

*Nichols v. Kansas City*, 291 Mo., 690, 237 S. W., 107.

Even where the assessments amounted to a very large proportion of the value of the abutting property.

*Nichols v. Kansas City*, 291 Mo., 690, 237 S. W., 107.

Apparently, however, this method had been found in some instances to throw too heavy a burden upon the property fronting on the improvement. Unlike the cost of paving, which is substantially the same wherever laid, the cost of grading differs tremendously and has less relation to the effect on immediately abutting property. In some cases, the cut or fill may be sufficient to leave such property practically worthless (Trans. 70).

To meet this situation, the present charter (adopted in 1908) added Section 28 of Article VIII, permitting the cost of grading in certain cases to be spread over a larger benefit district. Section 3, providing for ordinary grading of streets, remains in effect, and may be followed in the discretion of the council in grading any highway. Section 28 is an alternative procedure, to be followed when, in the opinion of the council, the cost warrants it. The determina-

tion of the council is made final on this question (Trans. 28). Section 28 (Trans. 27-30) provides in substance:

When, in grading any highway, a very large or unusual amount of filling in or cutting away is necessary, necessitating an expense so large as to impose too heavy a burden on the land situated in the benefit district limited in Section 3, the cost of grading may be charged as a special tax on lands benefited thereby in proportion to the benefits accruing to the several parcels, exclusive of improvements, and not exceeding the amount of said benefit, said benefits to be determined by the Board of Public Works as hereinafter provided, and the limits within which parcels of land are benefited shall be prescribed and determined by ordinance. The finding of the Council as to the amount of work and expense shall be conclusive.

The work shall be provided for by ordinance, and the City may provide that the City shall file a proceeding in the Circuit Court of Jackson County, Missouri, in the name of the City, against the respective owners of land chargeable under this section with the cost of the work. The City shall allege the passage and approval of the ordinance, the approximate cost of the work the limits of the benefit district prescribed by the ordinance, and the prayer of the petition shall be that the court find and determine the validity of the ordinance and the question whether or not the respective tracts in the benefit district shall be charged with the lien of such work as provided in the ordinance.

Service in such proceeding shall be governed by the provisions of Section 11 of Article XIII of the charter. The City shall have the right to offer evidence tending to prove the validity of the ordinance and of the proposed lien, and the property owners shall have the right to introduce evidence tending to show the invalidity of the ordinance and of the lien against the respective lots. The court shall determine whether or not the parcels of each defendant should be charged with the lien.

Trial shall be in accordance with the Constitution and laws of the state, and the court shall render judgment either validating the ordinance and lien against the lots in the benefit district or against such lots as are found legally chargeable, or may render judgment that the ordinance and lien are in whole or in part invalid.

An appeal may be taken within ten days.

If the ordinance be sustained, the City may make a contract for the work, and after the work is completed, the estimate of cost and the apportionment thereof against the parcels in the benefit district shall be made by the Board of Public Works according to the assessed value thereof, exclusive of improvements, with the assistance of the City Assessor as provided in Section 3, and all the provisions of Section 3 relating to the apportionment and the levy, issue and collection of tax bills as in grading proceedings, shall apply to tax bills issued hereunder, except as to the number of installments.

Nothing in this section shall affect any previous section, the intention of this section being to provide an independent and separate method of improvements made under the provisions hereof.

There can be no serious question, in view of the authorities, that this Section 28 is constitutional. It provides for an ordinance authorizing the grading and establishing a benefit district; for a hearing after notice on the validity of the ordinance; for the doing of the work and the determination of its cost; for the apportionment of that cost against the lands in the benefit district according to the assessed value thereof, a special assessment being authorized for the purpose.

The only possible attack that can be made upon the constitutionality of this section is the one made by defend-

ants in the District Court. It was there stated by them as follows:

“The method of apportionment provided for in Section 28 of Article VIII of the charter is fundamentally so unfair and unjust as to result in the taking of property without due process, in violation of the Fourteenth Amendment to the Federal Constitution.”

Apparently this attack is made upon the plan as a plan, and not simply in its application to the present proceedings. It is urged that in almost no conceivable case can an apportionment of cost over a benefit district according to the assessed valuation of the lands, be defensible; that necessarily lands abutting on or nearer to the improvement are more greatly benefited than lands farther away; that therefore the assessments must decrease as distance from the improvement increases, or the assessments will be void. Since, under the plan of apportionment according to value, the assessments cannot so decrease, but on the contrary may actually increase, it is said that the whole plan is arbitrary and unconstitutional.

The theoretical basis of special assessments and the practical considerations which prevent the attainment of absolute justice in the application of any definite rule or method, are too well understood to require restatement. Courts of last resort have again and again recognized the impossibility of theoretical exactness in these matters, and upheld plans only roughly approximating the acknowledged principle of apportionment according to benefits.

In *Falbrook Irrigation District v. Bradley*, 164 U. S., 112, 17 S. Ct., 56, this Court, at page 176 of the opinion,

uses the following language with reference to apportionment based upon assessed value:

“Assume that the only theory of these assessments for local improvements upon which they can stand is that they are imposed on account of the benefits received, and that no land ought in justice to be assessed for a greater sum than the benefits received by it; yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to demonstrations in geometry. Some means of arriving at this amount must be used, and the same method may be more or less accurate in different cases involving different facts. Some choice is to be made and where the fact of some benefit accruing to all lands has been legally found, can it be that the adoption of an ad valorem method of assessing the lands is to be held a violation of the Federal Constitution? It seems to us clearly not. It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received, which is open to the discretion of the state legislature, and with which this court ought to have nothing to do. The way of arriving at the amount may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem, and far from a case of taking property without due process of law.”

It is now settled beyond all possibility of doubt that the method of distributing cost provided for in Section 28, of Article VIII of the Charter of Kansas City—i. e. distribution in proportion to the assessed valuation of the respective tracts, exclusive of improvements, as fixed by the assessor for the purposes of the assessment proceeding—is a valid and constitutional method of apportionment.

- Embree v. Kansas City and Liberty Boulevard Road District*, 240 U. S., 242, 36 S. Ct. 317, affirming 257 Mo., 593;
- Fallbrook Irrigation District v. Bradley*, 164 U. S., 112, 17 S. Ct., 56;
- Ilagar v. Reclamation District*, 111 U. S., 701, 4 S. Ct., 663;
- Houck v. Little River Drainage District*, 239 U. S., 254, 36 S. Ct., 58;
- Saxton National Bank v. Carswell*, 126 Mo., 436, 29 S. W., 279;
- Corrigan v. Kansas City*, 211 Mo., 608, 111 S. W., 115;
- West v. Burke*, 286 Mo., 358, 228 S. W., 775.

The theory that cost should be distributed over the district in exact proportion to the special benefits received by each parcel is recognized by the courts, but it is nevertheless frankly admitted that no method can do more than approach the goal and the courts therefore universally uphold all methods of distribution which tend, to a reasonable extent, to make the assessments proportional to the benefits.

Thus the cost may be distributed in proportion to frontage on the street improved.

- Ross v. Gates*, 183 Mo., 338, 81 S. W., 1109;
- French v. Barber Asphalt Paving Co.*, 181 U. S., 324, 21 S. Ct., 625.

Or in proportion to area.

- McGhee v. Walsh*, 249 Mo., 266, 155 S. W., 445;



*Heman v. Allen*, 156 Mo., 534, affirmed 181 U. S. 402, 21 S. Ct., 645;

*Houck v. Little River Drainage District*, 239 U. S., 254, 36 S. Ct., 58.

Or at a fixed sum per front foot.

*Wagner v. Baltimore*, 239 U. S., 207, 36 S. Ct., 66;

*Wagner v. Leser*, 239 U. S., 207, 36 S. Ct., 66;

*Parsons v. District of Columbia*, 170 U. S., 45, 18 S. Ct., 521.

None of these methods of apportionment is ideal. All have flaws. The unconstitutionality of each method has often been urged upon the courts. In *French v. Barber Asphalt Paving Company*, 181 U. S., 324, 21 S. Ct., 625, it was strenuously argued that the front foot rule of assessment is invalid and violative of due process of law, because it takes no account of actual benefits. In *Tonawanda v. Lyon*, 181 U. S., 389, 21 S. Ct., 609, the front foot rule was objected to because it made no provision for an inquiry into the value of the abutting lots. In *Houck v. Little River Drainage District*, 239 U. S., 254, 36 S. Ct., 58, the fixed tax per acre was alleged to be unconstitutional because the lands in the district vary in value, and the level tax was assessed without regard to the relative value of the respective tracts and without regard to benefits. In *Corrigan v. Kansas City*, 211 Mo., 608, 111 S. W., 115, the court says (p. 631):

“Appellant’s sixth point is that the uniform tax of two and one-half mills on the dollar, as shown by the city assessment rolls, ignores the question of benefits, and assesses all the property alike in the face of the

obvious fact that all is not to the same degree benefited. That is the same argument that has been in the past urged with so much force to show that the front foot rule of assessment for street improvement was invalid. This Court has expressed its opinion too often on that subject to render further discussion of it necessary."

The conclusion of the whole matter is admirably summarized by the Supreme Court of Missouri in *Construction Co. v. Shovel Co.*, 211 Mo., 524, 531, 111 S. W., 86, as follows:

"It is within the power of the legislature to create special tax districts, and to charge the cost of a local improvement, in whole or in part, upon the property in said district, either according to valuation or superficial area or frontage. (*Webster v. Fargo*, 181 U. S., 394; *Prior v. Construction Co.*, 170 Mo., 439; *Asphalt Co. v. French*, 158 Mo., 534; *Spencer v. Merchant*, 125 U. S., 345; *Egyptian Levee Co. v. Hardin*, 27 Mo., 495)."

There can be no doubt, under the authorities, of the constitutionality of Section 28.

## II.

**Ordinance No. 21831, providing for the grading of Meyer Boulevard, does not violate the United States Constitution.**

This ordinance carries out exactly the terms of Section 28 of Article VIII of the charter, and cannot therefore, be unconstitutional, unless it be in one particular, namely, in fixing the benefit district. For present purposes, that is the only

thing done by the ordinance which represents independent decision or action. The question, then, reduces itself to this: Is the benefit district fixed by the ordinance of such a nature as to render the ordinance unconstitutional?

A.

In determining this question, it must at all times be kept in mind that the question is not in the first instance a judicial one, but a legislative one. It is plain that no clear line can be drawn between public improvements—public in the sense that the entire municipality is interested therein to the exclusion of any particular locality, and local improvements—local in the sense that a particular locality is especially concerned. It is equally plain that no hard and fast rule can be laid down to determine exactly what extent of territory is specially concerned and exactly in what degree.

It has become firmly established that the primary duty of deciding these matters is placed by our form of government upon the legislative department, and that the decision of that department is conclusive, subject only to the limitation hereinafter mentioned. And this is true, as in all matters of legislation, without any notice to property owners or any hearing on the question whatsoever.

*Naylor v. Harrisonville*, 207 Mo., 341, 105 S. W., 1074;

*Heman v. Allen*, 156 Mo., 534, affirmed as

*Shumate v. Heman*, 181 U. S., 402, 21 S. Ct., 645;

*Williams v. Eggleston*, 170 U. S., 304, 18 S. Ct., 617;

*Nichols v. Kansas City*, 291 Mo., 690, 237 S. W.,

In *Spencer v. Merchant*, 125 U. S., 345, 8 S. Ct., 921, the court says (l. c. 357):

"The legislature itself determined what lands were benefited, and should be assessed. By this statute the legislature, in substance and effect, assumed that all the lands within the district defined by the statute of 1869 were benefited in a sum equal to the amount of the original assessment, the expense of levying it, and interest thereon; and determined that the lots upon which no part of that assessment had been paid, and which had therefore as yet borne no share of the burden, were benefited to the extent of a certain portion of this sum. That these lots as a whole had been benefited to this extent was conclusively settled by the legislature."

Quoting further (l. c. 353):

"The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do so, and may settle both questions for itself; and when it does so, its action is necessarily conclusive and beyond review. Here an improvement has been ordered and made, the expense of which might justly have been imposed upon adjacent property benefited by the change. By the act of 1881, the legislature imposes the unpaid portion upon the property benefited which has thus far borne none of the burden. In so doing, it necessarily determines two things, viz., the amount to be realized, and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision must of course be final. We can see in the de-

termination reached possible sources of error and perhaps even of injustice, but we are not at liberty to say that the tax on the property covered by the law of 1881 was imposed without reference to special benefits. The legislature practically determined that the lands described in that act were peculiarly benefited by the improvement to a certain specified amount which constituted a just proportion of the whole cost and expense; and while it may be that the process by which the result was reached was not the best attainable, and some other might have been more accurate and just, we cannot for that reason question an enactment within the general legislative power. That power of taxation is unlimited, except that it must be exercised for public purposes."

#### B.

There is, however, one limitation to this legislative power: its exercise must not be so unreasonable as to be arbitrary. The legislative body is presumed to proceed upon investigation and to act with reference to the requirements of the public good. The presumption is that it creates a taxing district and charges the expense of an improvement upon that district, only when satisfied that the improvement is of special benefit to the property in the district and that the amount of such benefit will be in excess of the tax. So long as the legislative body does not act arbitrarily, this presumption will prevail.

It is not competent, therefore, for the courts to consider whether as an original proposition, the cost of grading Meyer Boulevard should be charged against a local district or paid by general taxation. The courts are not authorized to pass as in the first instance, upon the question

where the limits of the district should be established. They may not weigh the advantages and disadvantages of various rules of apportionment and declare the tax bills illegal because the cost was not distributed in accordance with the rule deemed by them to be the most equitable. The issue is merely as to whether the legislative and municipal authorities acted beyond the bounds of reason. As said in *Brougham v. Kansas City*, 263 Fed., 115, the judgment of the court as to the expediency or necessity of the action taken cannot be substituted for the judgment of the body delegated by law with the power and responsibility of acting with respect to such questions. The true rule is that unless there clearly appears to be an abuse of legislative discretion, the courts cannot interfere.

*Carson v. Sewer Commissioners*, 182 U. S., 398, 21 S. Ct., 860;

*Fallbrook Irrigation Co. v. Bradley*, 164 U. S., 112, 17 S. Ct., 56.

The question presented to the court, in view of these authorities, is not whether the grading of Meyer Boulevard is a public improvement or a local improvement, not whether the benefit district charged with its cost is the best district that could be fixed; but whether the action of the council in determining the grading to be a local improvement and in fixing the limits of the district, was arbitrary and hence an abuse of legislative discretion. Unless the record requires an affirmative answer to this question, the validity of the ordinance must be sustained.

## C.

**(a) The grading of Meyer Boulevard is an improvement of such a nature that its cost may lawfully be charged against a local benefit district.**

It is certainly the general, if not the universal, method prescribed in city charters for grading streets, avenues and highways, that the cost shall be levied against the property in a benefit district. Even the front foot rule really involves a benefit district, consisting of the abutting property within a certain distance of the highway. As already shown, the Kansas City charter provides that ordinary grading shall be paid for by a district abutting on the improvement and extending back approximately one hundred fifty feet. Certainly at this late day, no further citation of authorities is necessary to sustain the validity of this provision.

The present proceeding had for its object the grading of an avenue or highway, to-wit, Meyer Boulevard, and no sufficient reason has been suggested for excluding it from the terms "avenue or highway." Every avenue contains in addition to the paved roadway, a considerable amount of parking and space for trees and other embellishments. We know of no rule fixing the percentage of roadway or parking or limiting the width of parking or forbidding flower-beds.

It was urged below that the boulevard partook much more of the nature of a park than of a highway and the District Judge in his opinion calls it a "super-boulevard" (Trans. 130) and states that it was conceived for the purpose of establishing an inspiring approach to Swope Park and incidentally as a thoroughfare (Trans. 128). But never-

theless, it is a highway, which is defined by Webster as a thoroughfare, and it is an avenue, which is defined as a broad street lined with trees. That it partakes largely of the nature of a park does not prevent it from being a local improvement. The very Swope Park to which it constitutes an approach is a local improvement for which assessments might have been levied against a benefit district.

In *Kansas City v. Bacon*, 147 Mo., 259, 48 S. W., 860, the court held that the entire cost incident to the condemnation of land for North Terrace Park, in Kansas City, could legally be assessed against a local benefit district. The Court says (l. c. 273):

“That the condemnation of land for a public park is for a public use, must be conceded; otherwise there is no foundation for the exercise of the right of eminent domain. The recent authorities are uniform. (*Kansas City v. Ward*, 134 Mo., 172; *County Court v. Griswold*, 58 Mo., 175; *Shoemaker v. U. S.*, 147 U. S., 297, and cases cited).

But a public park is not only a public use, but throughout the States of this Union, it is held to be a local improvement, conferring such benefits in the way of increased value to the land in the benefit district in which it is situated, as to justify special assessments against private property to pay the compensation for the land condemned for such park. The argument of the learned counsel for defendants, pressed to a logical conclusion, amounts to a denial of the right of the legislative body to define the benefit district. This court and the highest courts, Federal and State alike, have long ago repudiated the reasoning of appellants, and we see no reason for reversing decisions that have so long stood the test of judicial investigation, or for repeating the grounds upon which they are based.”



In *Kansas City v. Bacon*, 157 Mo., 450, 57 S. W., 1075, local assessments were sustained to pay for the cost of the establishment of Penn Valley Park in Kansas City.

In *French v. Barber Asphalt Paving Company*, 181 U. S., 324, 21 S. Ct., 625, we find the following:

“Whether the expense shall be paid out of the general treasury or be assessed upon abutting property or other property specially benefited \* \* \* is \* \* \* a question of legislative expediency.”

**(b) The benefit district was not fixed arbitrarily.**

Bearing in mind that exact equality of burden is an impossibility and hence unnecessary, and that the courts can only interfere when the legislative action is arbitrary and cannot substitute their own discretion or opinion for that of the legislative body, the courts have laid down certain general principles to govern their decisions in dealing with benefit districts.

In the first place, it has been definitely established that instances of individual injustice will not invalidate the legislative action in fixing the district. Proof that a particular assessment against a particular tract exceeds in amount the benefits accruing to that tract will not suffice to defeat the assessment.

*Barber Asphalt Paving Co. v. French*, 158 Mo., 534, 58 S. W., 934.

The individual tax may even exceed the value of the land against which it is assessed.

*Chadwick v. Kelley*, 187 U. S., 540, 23 S. Ct., 175.

The topography of the benefit district may be such that with respect to certain portions thereof there may be no possibility of benefit from the improvement, and yet the assessments against these portions will be enforceable.

*McGhee v. Walsh*, 249 Mo., 266, 155 S. W., 445;  
*Heman v. Schulte*, 166 Mo., 409, 66 S. W., 163.

Indeed, the fact that the improvement damaged, rather than benefited, certain of the assessed property is immaterial.

*Keith, v. Bingham*, 100 Mo. 300, 13 S. W., 89.

The question is, not whether the individual assessment exceeds the individual benefit to the particular lot, but whether the total assessment exceeds the total benefit to the district.

Moreover, and in the second place, even this excess of total assessment over total benefit must be gross—so far out of all reasonable proportion as to be entirely indefensible. Reasonable latitude must be allowed because exactness is impossible of attainment.

In *Louisville & Nashville R. R. v. Barber Asphalt Paving Company*, 197 U. S. 430, 25 S. Ct. 466, the Supreme Court, at page 433 of the opinion, uses the following language in upholding a paving tax levied in proportion to the area of the lots in the benefit district:

“There is a look of logic when it is said that special assessments are founded on special benefits and that a

law which makes it possible to assess beyond the amount of the special benefit attempts to rise above its source. But that mode of argument assumes an exactness in the premises which does not exist. The foundation of this familiar form of taxation is a question of theory. The amount of benefit which an improvement will confer upon particular land, indeed whether it is a benefit at all, is a matter of forecast and estimate. In its general aspects at least it is peculiarly a thing to be decided by those who make the law. \* \* \* A statute like the present manifestly might lead to the assessment of a particular lot for a sum larger than the value of the benefits to that lot. The whole cost of the improvement is distributed in proportion to area, and a particular area might receive no benefits at all, at least if its present and probable use be taken into account. If that possibility does not invalidate the act, it would be surprising if the corresponding fact should invalidate an assessment. Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things. And that has been the implication of the cases. *Davidson v. New Orleans*, 96 U. S. 97, 106; *Mattingly v. District of Columbia*, 97 U. S. 687, 692; *Parsons v. District of Columbia*, 170 U. S. 45, 52, 55; *Detroit v. Parker*, 181 U. S. 399, 400; *Chadwick v. Kelly*, 187 U. S. 540, 544."

The court below apparently put its decision upon the finding that the total tax bills unreasonably exceed any possible benefit to the total benefit district. We will discuss the propriety of this finding later. Before doing so, the action of the city authorities from a legislative standpoint should be considered.

Swope Park had previously been acquired. The land

for Meyer Boulevard had been condemned and the grade established. The next step was the actual work of grading.

The proper boards and the council determined that the cost would be too great for apportionment over the usual benefit district, and that, therefore, the larger benefit district provided for in Section 28 should be established. The charter makes this decision conclusive, and apparently the district court approved of it (Trans. 130-131). The council fixed the limits of such district by ordinance, under the recommendation of the Park Board.

In view of the presumption in favor of such action and of the testimony introduced on the point, it seems utterly incomprehensible to us that this benefit district could be held arbitrary. The adverse decision of the district court can be accounted for in but one way—that the court erred in admitting and gave improper and undue weight to the assessments of the property for general taxation. That will be discussed later. At this time, we desire simply to call attention to the considerations which determined the action of the council in fixing the district.

W. H. Dunn, Superintendent of Parks of Kansas City, connected with the Park Department for twenty-two years, testified that the boulevard was laid out through unplatted, acreage property extending from 63rd Street on the north to 67th Street on the south. South of 67th Street, the land had been platted into small ownerships. North of 63rd Street, much the same condition existed. Acreage property can more feasibly be made to conform to the improvement than property in small subdivisions and ownerships. Grading a boulevard is customarily a benefit to the property adjacent to it and on adjacent streets connected with it. A

boulevard like this could not be put through that class of undivided property without putting it on the market and giving benefit to it. Meyer Boulevard constitutes of course an important artery in the whole park system. It was for this reason that the benefit district was enlarged beyond the district ordinarily assessed with the cost of grading. It is generally true that abutting property receives more special benefits than property at a distance (Trans., 102-105).

Charles C. Craver, a real estate man for twenty years, member of the Park Board at the time of the proceedings in question, testified that the first thing considered was the burden of placing the whole cost on abutting property. So much of the property was below grade and affected adversely by the grade, that it was thought best to establish a larger benefit district. The judgment was largely influenced by the measure of benefit to adjacent property and how far that benefit would extend. A benefit district is largely a matter of compromise. In this instance, 63rd Street was considered a reasonable northern boundary because traffic originating north of 63rd Street would naturally flow north, and 63rd Street was an open and traveled street at that time. 67th Street was also open and though not fully improved, was in contemplation as a traffic way. South of 67th Street, the property was platted into small lots, sold on the installment plan, with small houses occupied by poorer people. The nature of the country south of 67th Street was such that it could not be improved so as to get full benefit of the improvement, and it was therefore thought unfair to extend the district farther. A compromise was finally reached, and the district fixed as shown. The judgment of the board at that time is still my judgment (Trans., 105-107).

He further testified that it would be impracticable for people living south of 67th Street to go direct to Meyer Boulevard because of the grade leading up to it from the south. Some of the property on the south is as much as fifteen or eighteen feet below grade. Furthermore, it is a class of property served more by street cars than by boulevards. The grading of the boulevard through open, unimproved property affects the property very favorably in value. The benefit is not confined to the abutting property, but extends back a considerable distance depending upon the particular circumstances. The property both north and south of the boulevard in the district increased in value by the grading, especially that on the north, which is above grade and of a better class. The benefit is greater on unimproved property than on platted property (Trans. 108-111).

Mr. Craver also testified, in answer to questions by the court, that the fixing of the benefit district was a matter of compromise. He explained what he meant by compromise: that interested people appeared before the Board and presented their ideas; that the Board heard them, went over the matter and then reconciled the divergent ideas of the board (Trans. 112-113).

Cusil Lechtman, a member of the Park Board at the time of the proceedings in question, testified that in arriving at the limits of the district he considered the extent of the direct as distinguished from the consequential benefits. Because 63rd Street on the north was already quite a thoroughfare and a street car line was contemplated on 67th Street, because the land north of 63rd Street was platted and that south of 67th Street laid out into small lots, and because the land between the two streets was unplatted and had no im-

provements, he fixed the direct benefit between the two streets. The improvement no doubt benefited the whole city, but the greatest benefit is to close-by property. It causes an immediate benefit to nearby property (Trans. 113).

It is difficult to conceive that even a court could take a fairer attitude toward a difficult question, give a clearer consideration to the circumstances and necessities of the situation, or reach a more just result. We earnestly request that the testimony of the witnesses Dunn, Craver and Lechtman be carefully considered by the court. It is comparatively easy to point out theoretical weak spots in the district as fixed, but we challenge all objectors to offer any practical limits that will not involve more glaring defects than the limits established by the council. The district has been held to be unreasonable and arbitrary; but the pleadings, record and opinion of the lower court will be read in vain to find whether it is unreasonably small or unreasonably large, and what, if any, definite parcels should have been included or excluded to make it reasonable.

The allegations of the bill regarding the unreasonable-ness of the district, charge that land on the north not benefited was included, and land on the east and south benefited was excluded (Trans., 13); that the district was too small in view of the character of the improvement (Trans., 13); and that the land north of the boulevard is more than double the land south, whereas it is an obvious fact that owners and occupants of land south will have use of the boulevard while those north will have practically none (Trans., 13-14).

In support of these allegations, the complainants introduced the opinions of two real estate dealers, Garrett Elli-

son and H. V. Jones. Mr. Ellison testified that in his opinion Tracts 14 and 15 received a slight local benefit, but only a very small one. The property would have brought very little, if any, more on the market after than before the grading. Much the same was true of Tracts 2, 3, 8 and 11. Tracts 2 and 3 may have sustained an actual detriment. The greater part of the benefit from the grading was received by the property abutting on the boulevard, except that considerably below grade. Next in the matter of benefit would come the land south, next the property north. The nearer the boulevard, the greater the benefit as a general rule (Trans., 67-73).

Mr. Jones testified that Swope Park received a special benefit, the boulevard being a connection between the Park and the city. The property south of the boulevard received considerable of the special benefit. Tracts 14 and 15 received very little, if any, benefit; Tract 11, very remote benefit; Tract 2, none; Tract 3, much the same, except that the south end did receive some benefit, disappearing toward the north; Tract 8, very small benefit. It is very difficult to state the exact amount of benefit in dollars and cents, but it is far less than the amount of tax.

He further testified that the 150 feet just south of 63rd Street was not increased in value, whereas the 150 feet fronting on the boulevard was enhanced in value. The special benefits extended south as far, at least, as 75th Street. Both north and south, the benefit decreases as the distance from the boulevard increases. In some instances, there is a tendency for the best residences to recede from the boulevards. All property in the immediate neighborhood of all these boulevard improvements has been in most



instances specially benefited by the improvements (Trans., 82-86).

Mr. Kelly Brent, called on behalf of the appellants, testified that he was familiar with the character of the benefit district and with the character of the property north and south of the district and that, in his opinion, the district as fixed, was a reasonable one upon which to assess the cost of the improvement. He emphasized the fact that all of the land within the benefit district was acre property, unplatted and undeveloped, and that the boulevard would be a great benefit to it in opening it up and putting it on the market. He also brought out the fact that the property south of 67th Street had been platted into small tracts and developed in such a way that it would not be benefited materially by the opening of the boulevard. He stated that the property north of 63rd Street had been platted into relatively large tracts and built up for residence purposes and that the character of this property had been more or less fixed by the existing improvements and would not be benefited by the boulevard as much as the property between 63rd Street and 67th Street. Mr. Brent further testified that grading Meyer Boulevard damaged some of the dwelling property, inasmuch as over 50% of the property abutting on the boulevard was below the grade of the boulevard. He stated that the property on 65th Street would be as much, if not more, benefited by the grading than the property immediately abutting on the boulevard (Trans., 114-116).

Mr. John A. Moore, called as a witness on behalf of appellants, testified that he had had thirty-five years' experience in the platting and selling of residence property

in Kansas City, Missouri, and that he was familiar with the real estate values in the benefit district in question. He stated that, in his opinion, the district fixed by the ordinance for the grading of Meyer Boulevard was a reasonable one, for the reason that the property included within the district, being unplatted and undeveloped property, was susceptible of a better improvement than property already built up. The property south of 67th had been platted into small lots and built up with small cottages and its character had thereby been established as a low class district and the boulevard would not materially improve it. The property north of 63rd Street had been platted and improved and, therefore, the boulevard would not materially affect it. He stated that it was practically impossible to change a neighborhood once built up and that he had observed that boulevards constructed through poor neighborhoods did not have the effect of changing the character of the district and poor buildings continued to remain on the boulevard. If, however, a boulevard runs through or near a large vacant unplatted tract, it makes possible a development of the tract on a large scale and very great benefits result. Mr. Moore also stated that while, as a rule, the development of a boulevard more favorably affects directly abutting property, this is not always the case and that with regard to this particular improvement, a considerable amount of the abutting property was practically destroyed in value because of the fact that so much of the abutting property was very much below the grade of the boulevard (Trans., 116-117).

It is not apparent why the testimony of the witnesses Ellison and Jones should prevail over that of witnesses Brent and Moore. The testimony of all is opinion merely,

based upon their own personal ideas of real estate values, unconsciously colored perhaps by the natural leaning of experts toward the side that calls them. Properly enough, they focus attention on the considerations most favorable to that side and minimize those less favorable.

It is still less apparent why this testimony should be accepted as overthrowing the well-considered judgment of the legislative body charged with the duty of determining a practical benefit district for the purpose of grading this boulevard. Not one of these witnesses denied that the improvement was a special benefit to the district as a whole; or that the benefit to the district as a whole was less than the total assessment therefor. Not one affirmed that a single ground upon which the council acted in limiting the district was not well founded and entitled to weight; or that these grounds were not, taken together, ample to justify the district as fixed.

Giving this testimony its utmost weight, it tends to show that in the opinion of witnesses Ellison and Jones; first, the city as a whole derived a large benefit from the improvement; second, Swope Park received special benefit; third, Tracts 8, 11, 14 and 15 received very little special benefit, and Tracts 2 and 3 practically none; and fourth, the lands south of 67th Street to 75th Street were specifically benefited. That is everything, so far as the benefit district is concerned. If the validity of assessments for public improvements is to depend upon the opinion of real estate dealers upon values and increases of value, then no proceedings for such purpose can withstand attack.

Of course, the city at large derived a benefit from the

improvement. As said in *Kansas City v. Bacon*, 147 Mo. 259, 273, above cited: "That the condemnation of land for a public park is for a public use, must be conceded; otherwise there is no foundation for the exercise of the right of eminent domain."

Where the charter, as in the present section, leaves to the city authorities the determination of the question as to whether any part of the cost shall be paid by the city, the decision of the city authorities is conclusive, and not subject to review.

*Kansas City v. Ward*, 134 Mo., 172, 35 S. W., 600;  
*Bauman v. Ross*, 167 U. S., 548, 17 S. Ct., 966;  
*French v. Barber Asphalt Paving Company*, 181 U. S., 324, 21 S. Ct. 625;  
*Houck v. Little River Drainage District*, 239 U. S., 254, 36 S. Ct., 58;  
*Kansas City v. Bacon*, 147 Mo., 259, 48 S. W., 860.

It may be, too, that Swope Park received some benefit. Whether the park should bear any part of the cost is conclusively for the determination of the council.

*Corrigan v. Kansas City*, 211 Mo., 608, 11 S. W. 115;  
*Kansas City v. Bacon*, 147 Mo., 259, 48 S. W., 860.

Possibly lands south of 67th Street might justifiably have been included. It is well settled that the circumstance that property outside of the benefit district is bene-

fited by the improvement does not make the district as established unreasonable.

*Kansas City Grading Co. v. Holden*, 107 Mo., 305,  
17 S. W., 798.

And as we have already shown, the inclusion of particular tracts that are little benefited, or not benefited at all, or actually damaged, will not defeat the legislative action.

The presumption is that the district as established is reasonable.

*Mullins v. Cemetery Association*, 268 Mo., 691, 187  
S. W., 1169;

*Northern Pacific R. R. v. Seattle*, 46 Wash., 674,  
91 Pac., 244.

It is not possible that this presumption can be overcome by such testimony as this. Nor can there be found in the record a single statement or fact supporting the conclusion of the lower court that the total tax bills unreasonably exceed the benefit to the total benefit district. There is a complete failure of evidence in this matter.

The contention that the district is unreasonable and arbitrary because more land is included north of the boulevard than south of it is entitled to no weight whatsoever. The power to fix the district must of necessity include the power to determine how far on either side the benefit extends. Whatever inequalities may result from the establish-

ment of a district according to the judgment of the council as to the property benefited, would be infinitely increased in most instances should the charter require that the district must extend an equal distance on each side of the improvement.

As a matter of reason and common sense, the mere irregularity of a benefit district cannot be a ground for holding it arbitrary. Indeed, its regularity might well be considered a more logical ground for so holding, since it is doubtless very rarely that special benefits accurately follow the lines of the compass and the square. As a matter of authority, districts much more irregular than the present have been sustained by the courts.

*Construction Co. v. Shovel Co.*, 211 Mo., 524, 111 S. W., 86, sustains an irregular district, extending 700 feet from the improvement in one direction, and only 35 feet in another.

In *Voris v. Pittsburgh Plate Glass Co.*, 163 Ind., 599, 70 N. E., 249 and in *Cleveland Ry. Co. v. Porter*, 210 U. S., 177, 28 S. Ct., 647, a statute of Indiana, known as the Barrett Law, is held to be constitutional. That statute fixes the cost of paving in the first instance upon the abutting property extending back from the street to a distance of 50 feet. The assessment proceedings are had with reference merely to this 50-foot strip. The published notice to property owners describes merely the 50-foot strip. The statute then provides that if the respective lots in this district are sold to satisfy the tax bills issued against them, and prove insufficient in amount, the land immediately behind the lots

sold, back to a distance of 150 feet from the street, shall be subject to the lien of the unpaid balance of the tax bills. As a result, the boundary of the benefit district finally fixed may be an irregular line, jumping alternately back and forth from points 50 and 150 feet from the street.

In *Spencer v. Merchant*, 125 U. S., 345, 8 S. Ct., 921, and other cases sustaining reassessment statutes, the benefit district is necessarily irregular, since it consists of only those tracts in the original benefit district whose assessments had not been paid. In such a case the tracts in the district fixed by the reassessment law may not even be contiguous.

The absurdity of the contention cannot be better illustrated than by a reference to the actual result in the present proceedings. Here is a broad, open, unplatted area extending from 63rd to 67th Streets; a boulevard is to be graded through this area; if it is located in the mathematical center from north to south, the entire tract may, under the contention, be said to be benefited; if it is placed on a varying line averaging five hundred or six hundred feet south of the center, the entire tract may not, under the contention, be said to be benefited. And this without any consideration of the topography or development of the area and its surroundings.

In our opinion, after all the evidence is considered, the court cannot itself fix a more reasonable district than that fixed by the council. But even if it could suggest certain proper amendments, there is still no ground for holding the

district as fixed invalid. As is said in *Louisville & Nashville R. R. v. Barber Asphalt Paving Co.*, 197 U. S., 430, 435:

"We are not called on to say that we think the assessment fair. But we are compelled to declare that it does not go beyond the bounds set by the 14th Amendment of the Constitution of the United States."

**(c) The contention that the benefit district is illegal for the reason that a different, and much larger, district was assessed with the cost of condemning land for the boulevard has no merit.**

The condemnation and grading proceedings are entirely separate, and represent distinct improvements of different character. This argument, if sound, would mean that the cost of grading or even of paving a street could not be assessed upon the abutting property, but must be spread over the same district as that established in the condemnation proceeding.

In *Houck v. Little River Drainage District*, 239 U. S., 254, 36 S. Ct., 58, a statute is upheld which makes provision for two separate benefit districts for the same improvement—one to pay for the preliminary cost of determining whether or not the proposed work shall be done, the other to be assessed with the actual cost of the completed work. If there may be separate districts for the same improvement, the existence of separate districts for separate improvements should not cause doubt as to the legality of either district.

As a matter of fact, the condemnation proceedings in which Meyer Boulevard was established included many



blocks of boulevard not included in the grading proceedings and involved lands in three distinct park districts (Trans., 40-45).

In connection with the contention that the cost of this improvement should have been distributed over a much larger district, it is important to note that in the usual grading proceeding under the Kansas City Charter, cost is charged only upon lands back 150 feet from the graded street. Section 28 of Article VIII provides that if the fills and cuts are of such magnitude as to impose too heavy a burden upon this 150 foot strip, the Council may make provision for an enlarged district. It seems evident that a district *somewhat deeper than 150 feet* is contemplated. There is no warrant whatsoever for the assumption that only a district many times larger than the usual one—perhaps several miles in width—is authorized. The ordinary construction would be that the enlarged district contemplated in Section 28 of Article VIII is a district somewhat commensurate with the benefit district in the usual grading proceeding. Certainly there is no ground for holding that it must be either 150 feet or a whole Park District, and that the council is acting arbitrarily if it fix limits between the two.

Appellants further contend, with regard to the reasonableness of the benefit district, that this question was adjudicated in the proceedings filed in the Circuit Court of Jackson County as provided in the charter and ordinance and is therefore not now open for consideration. This will be discussed under a separate heading. (*Infra* VII).

**(d) That property not abutting on the improvement cannot as a physical fact be benefited as much as property abutting thereon is both untrue and immaterial.**

This contention, while apparently aimed at the fairness of this particular district, is in truth another form of attack on the general method of apportioning benefits according to assessed valuation. In every case where a benefit district is established and the assessment made according to value, no account is taken of distance from the improvement. This contention is disposed of in Point I, *supra*.

In *Embree v. Kansas City and Liberty Boulevard Road District*, 240 U. S., 242, 36 S. Ct., 317, property for a distance of one mile on each side of the boulevard is taxed in the same proportion, in accordance with the assessed valuation of the respective tracts. It would seem therefore that a district extending only three blocks from the boulevard could be charged according to a uniform standard throughout.

In *Kansas City v. Bacon*, 147 Mo., 259, 48 S. W., 860, the cost of the proceeding was spread over an entire park district, in proportion to the assessed valuation of the respective tracts. The court in that case did not require a graduated scale of apportionment though the benefit district was many times larger than the district in the present proceeding.

*Kansas City v. Bacon*, 157 Mo., 450, 57 S. W., 1075, conclusively settles the point against complainants' contention. It resulted in that case that certain lots very near the im-

provement were assessed in sums which amounted to \$2.00 per front foot. Complainant's lots, a mile or more away, was taxed \$50 per front foot. The court said at page 474 of the opinion:

"In connection with this point is argued, what is claimed to be hardship and manifest inequality of the assessment. We are given as a conclusive illustration, the assessment of \$2 per front foot on a lot very near the park, and \$50 a front foot on appellant's property a mile or more away. That inequality is not so self-evident that it may be so declared as a matter of law. Two dollars a front foot on a lot in an unimproved and sparsely settled district remote from the center of trade might be in fact a greater rate *ad valorem* than fifty dollars a front foot, on a business lot in the heart of the traffic."

The legislature may provide for any reasonable method of apportionment of cost. If the method selected be a reasonable one, the legislative determination is not subject to review.

*Walston v. Nevin*, 128 U. S., 578, 9 S. Ct., 192;

*Embree v. Kansas City and Liberty Boulevard Road District*, 240 U. S., 242, 36 S. Ct., 317;

*Spencer v. Merchant*, 125 U. S., 345, 8 S. Ct., 921;

*Bauman v. Ross*, 167 U. S., 548, 17 S. Ct., 966;

*French v. Barber Asphalt Paving Co.*, 181 U. S., 324, 21 S. Ct., 625;

*Houck v. Little River Drainage District*, 239 U. S., 254, 36 S. Ct., 58.

Moreover, the assertion of fact is not, as stated, "above dispute." It is not a physical fact that property at a

distance cannot and does not receive as much benefit as abutting property. There are many other facts, such as the nature of the district, its topography, the extent of cuts and fills, that must enter into the question. Complainants' witness Ellison testified that in some cases the value of abutting property might be entirely taken away (Trans. 70). Their witness Jones testified that in certain instances the best residences have a tendency to recede from the boulevards (Trans. 85). Can it be said that the council acted arbitrarily in finding that this was a case where, taking all these matters (and others) into consideration, a benefit district extending from 63rd to 67th Street was the best practical district? Was such action in the fact of "a physical fact, beyond dispute?"

Clearly no such showing has been made as to authorize the court, whose sole province is to determine, not the reasonableness of the district, but the reasonableness of the action of the council in fixing it, to hold the ordinance unconstitutional because the district is an arbitrary exercise of legislative power.

### III.

**The proceedings subsequent to the ordinance do not violate the Constitution of the United States.**

Except for the provisions relative to the suit in the Circuit Court, the proceedings subsequent to the ordinance follow almost exactly the proceedings provided in Section 3 of Article VIII for ordinary grading. Indeed, Section 3 is referred to in Section 28 as establishing the necessary steps in making and paying for the grading. The only at-

tack made on these proceedings, except that on the Circuit Court suit which is discussed separately (Point VI, *infra*), is the contention that the assessment of values was without notice or hearing, was about four times the assessment for general taxes, and was arbitrary, unjust and excessive. Of these in order.

(1) The extent of the notice and hearing necessary in special assessment proceedings varies according to the nature of the action being taken. In general, it has been established that as to matters determined by the legislative body, no notice or hearing is necessary; as to delegated administrative matters, no notice or hearing is necessary; as to matters to be determined by courts, or officers or boards acting judicially, a hearing at some stage is essential.

*Parsons v. District of Columbia*, 170 U. S., 45, 18 S. Ct., 521;

*Hagar v. Reclamation District*, 111 U. S., 701, 4 S. Ct., 663;

*Voigt v. Detroit*, 184 U. S., 115, 22 S. Ct., 337.

Where cost is apportioned according to assessed valuation as provided in Sections 28 and 3, it may be that the action of the assessor in fixing the values is judicial. If so, the owners, at some point, are entitled to be heard on the question. Sections 28 and 3 do not in themselves provide for such hearing. Section 24 of Art. VIII provides, however, that tax bills issued under these proceedings are collectible only by action at law, after service duly had. The section further provides:

“That nothing in this section shall be so construed

as to prevent any defendant from pleading and proving in reduction of any bill any mistake or error in the amount thereof."

Does this section provide a sufficient hearing upon the question of assessment?

Notice and opportunity to be heard at every stage of the assessment proceedings are not required by due process of law.

*Voight v. Detroit*, 184 U. S., 115, 22 S. Ct., 337;  
*Wight v. Davidson*, 181 U. S., 371, 21 S. Ct., 616;  
*Pittsburg R. R. v. Board of Public Works*, 172 U. S., 32, 19 S. Ct., 90;  
*In re Amsterdam*, 126 N. Y., 158, 27 N. E., 272.

Thus, if opportunity for a hearing is given at some later stage, no hearing need be had before the board or other body determining the benefits or fixing the valuation of the tracts for the purposes of the proceeding.

*Walston v. Nevin*, 128 U. S., 578, 9 S. Ct. 192;  
*Embree v. Kansas City and Liberty Boulevard Road District*, 240 U. S., 242, 36 S. Ct. 317;  
*Winona & St. Paul Land Co. v. Minnesota*, 159 U. S., 526, 16 S. Ct., 83;  
*St. Louis v. Richeson*, 76 Mo., 470.

An opportunity to file objections and to be heard thereon after the special taxes have been levied satisfies due process, although there be no other or prior notice.

*In re Amsterdam*, 126 N. Y., 158, 27 N. E., 272.

Similarly, a right of appeal from assessments, made without notice or hearing makes the proceeding constitutional.

*King v. Portland*, 184 U. S., 61, 22 S. Ct., 290.

If, therefore, the tax bills issued can be enforced only by suit, had after due service, and if the property owner can in such suit be heard upon the question of the assessment, then the requirements of due process are thereby met so far as the assessment is concerned. Opportunity to be heard in the collection proceeding satisfies the Fourteenth Amendment.

Under Section 24, the tax bills in controversy can be enforced only by suit, had after due service, and the property owner can in such suit be heard upon the question of the assessment. The right to such hearing is expressly given in the proviso quoted.

*Embree v. Kansas City and Liberty Boulevard  
Road District*, 240 U. S., 242, 36 S. Ct., 317;  
*Neil v. Ridge*, 220 Mo., 233, 119 S. W., 619;  
*First National Bank v. Nelson*, 64 Mo., 418;  
*Nichols v. Kansas City*, 291 Mo., 690, 237 S. W.,  
107;

In *Saxton National Bank v. Carswell*, 126 Mo., 436, 29 S. W., 279, an identical provision in the Chapter of the Revised Statutes governing cities of the second class in Missouri, was held to mean that in the suit on the tax bill the owner may set up any defense he has, including the defense

that his land was over-valued by the city assessor, and a hearing may then be had on such question.

As pointed out by the court in *St. Louis v. Richeson*, 76 Mo., 470, this must be the sense of a provision, without more, that the tax bill can be collected only by suit.

There being, therefore, an opportunity for the owners to be heard in the suits on the tax bills, the procedure prescribed is due process. As the court says in *Winona & St. P. Land Co. v. Minnesota*, 159 U. S., 526, 16 S. Ct., 83:

“Questions of this kind have been repeatedly before this court, and the rule in respect thereto often declared. That rule is that a law authorizing the imposition of a tax or assessment upon property according to its value does not infringe that provision of the 14th Amendment to the Constitution which declares that no state shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity or amount of it either before that amount is determined, or in subsequent proceedings for its collection.”

Such is unquestionably the settled law.

*Weyerhaeuser v. Minnesota*, 176 U. S., 550, 20 S. Ct., 485;

*Kentucky Railroad Tax Cases*, 115 U. S., 321, 6 S. Ct., 57;

*Hagar v. Reclamation District*, 111 U. S., 701, 4 S. Ct., 663;

*Wells Fargo & Co. v. Nevada*, 248 U. S., 165, 39 S. Ct., 62;

*Kansas City v. Huling*, 87 Mo., 203;

*Barnes v. Pikey*, 269 Mo., 398, 196, S. W., 883;

And cases hereinbefore cited under this Point.



(2) The allegation that the special valuation of complainants' property for the purposes of this proceeding is four times the assessment of the same property for general taxes is utterly irrelevant and immaterial to the question here involved. This for two reasons: first, because it makes absolutely no difference in the amount of the benefits levied against the land; and second, because the fact, if established, does not in any way indicate a wrongful valuation.

Under the provisions of the charter, the valuation of the land is important only as a measure of distribution among the various tracts charged with the benefits. It is the relative valuation only that matters; the absolute value is entirely unimportant. If the valuation of every tract in the district be divided in half, the distribution remains the same. If the valuation be multiplied by four, it makes not a penny difference, so long as each tract is treated alike. That complainants' property was quadrupled in value does not increase their liability unless at the same time other property in the district was not quadrupled. This is a mathematical certainty.

Moreover, there is no evidence whatsoever that four times the assessment of property for general taxes is not a fair estimate of its real value. We know of no ground upon which the assessment for general taxes, unless made by the owner himself, is admissible for any purpose or is competent to establish real value. This is considered later, under Point IV, *infra*.

(3) As to the allegation that the valuation was arbitrary, unjust and excessive, there is a complete failure of evidence. No witness attempted to put a value upon any

tract in the district and there is not a word in the record to suggest that one tract was valued too highly as compared with another. We have shown under (2) above that excessive valuation, if not discriminatory, does complainants no harm and can avail them nothing. Unjust valuation, unless discriminatory, has no meaning in these proceedings. Arbitrary valuation, in order to avoid the assessment, must be arbitrarily discriminatory as between tracts. There is absolutely no evidence of discrimination or indeed of the value of any particular tracts whatever, or of the district as a whole. The lower court was manifestly wrong in its findings as to value.

#### IV.

**There was no testimony of excessive valuation, or of discrimination in valuation, or of any value at all.**

The complainants offered no testimony as to the actual value of any tracts in the benefit district either before or after the grading. None was offered by the defendants. Yet the lower court found that "these tax bills amount to more than one-third of the actual value and that the benefit to complainants' property, if any, is negligible." (Trans. 131). The decision of the court setting aside the tax bills is based largely on this finding. The opinion shows that the court in reaching that result acted upon testimony wrongfully admitted in evidence over defendants' objection, entirely incompetent and of no probative value whatever—the assessments for general taxation for the years 1915, 1916 and 1917. The admission of the assessments was error

and the conclusions based thereon are not supported by any competent testimony.

No case has been found where an assessment for taxation made solely by public officials has been held competent to establish value, either against the owner or the municipality. The universal rule is to the contrary.

22 Corpus Juris, 178, Sec. 122;

13 Ency. of Evi. 454.

In condemnation proceedings it has been consistently held that assessments, unless the value is fixed by the owner, are not competent even against the city to show real value.

*Girard Trust Co. v. Philadelphia*, 248 Pa. 179;  
93, Atl. 947.

*Wayland v. Seattle*, 96 Wash. 344, 165 Pac., 113;

*Marine Coal Co. v. Pittsburg M. & Y. R. R. Co.*,  
246 Pa. 478, 92 Atl., 688;

*Hildreth v. City of Longmont*, 47 Colo. 79, 105  
Pac., 107;

*Baltimore v. Carol*, 128 Md. 68, 96 Atl., 1073;

*Suffolk & C. Ry. Co. v. West End Land Co.*, 137  
N. C. 330, 49 S. E., 350;

In this last case, the Court said:

"Where the mere listing of the land is the act sought to be shown, the tax lists are admissible because the lister is the actor; but the rule is essentially different where the value of the land is sought to

he proved thereby, because the valuation is the act of the assessors, and therefore *res inter alios acta* as between the parties to this proceeding. The tax lists were not competent evidence to show the value of the land, as the assessors were not witnesses in the case, sworn and subject to cross-examination in the presence of the jury. The tax valuation being placed on the land by the tax assessors without the intervention of the land owner, no inference that it is a correct valuation can be drawn from his failure to answer that the valuation is too low. Such valuation was *res inter alios acta* and is not competent against the plaintiff."

The rule has been followed in other proceedings.

*Fort Collins Dev. Co. v. France*, 41 Col. 512, 92

Pac., 953;

*Savannah Ry. v. Buford*, 106 Ala. 303, 17 So., 395;

*St. Louis, I. M. & S. Ry. Co. v. Magness*, 93 Ark.

46, 123 S. W., 786;

*Denver & R. G. R. Co. v. Heckman*, 45 Colo. 470,

101 Pac., 976;

*Kelly v. People's Natl. F. I. Co.*, 262 Ill., 158, 104

N. E., 188;

*Martin v. N. Y. & N. E. Ry. Co.*, 62 Conn. 331, 25

Atl., 239;

*Hamilton v. Seaboard Air Line*, 150 N. C., 193, 63

S. E., 730.

In the case last cited, the court said:

"Under our revenue law, the owner of land does not, in listing it for taxation, fix any value upon it. This is done by the assessors either from actual view or from the best information that they can practically obtain, according to its true valuation in money. We cannot see therefore, how the fact that the witness listed the land for taxation has any tendency to show

its value or his opinion in that respect. The valuation is *res inter alios acta*. The objection is not that tax lists are not public records, but in the valuation of the land for taxation, the owner is not consulted, he takes no part. The valuation is but the opinion, upon oath it is true, of these assessors for the purpose of taxation. It is well understood that it is the custom of the assessors to fix a uniform rather than an actual valuation."

The lower court itself, while admitting and considering these assessments, recognizes their entire unreliability. The court says:

"Now, while property of this nature is not assessed at full valuation for general purposes, no one will contend that it is assessed at practically only one-fifth of its actual value. Thirty or forty per cent on city property would be the lowest acceptable figure." (Trans. 131).

By what right can the court, after admitting incompetent assessments, determine without evidence—by judicial notice solely—that such assessments are not at twenty per cent, but are at thirty or forty per cent? If this is a matter for judicial notice, we do not know upon what ground it is so to be held. It may be well understood, as said, in one of the cases, that such assessments are unreliable as showing the real or market value of property; it is certainly a notorious fact, as said in another case, that the assessment of real property made by county assessors affords no criterion whatever as to its value. But if they are unreliable and afford no criterion of value, then the court has no legitimate basis for holding, without evidence, that they are thirty per cent or forty per cent and not twenty per cent of the actual value.

The court is in error in saying that no one will contend that the assessment for general taxation is only twenty per cent, just as the court is wrong in assuming that the City Assessor had anything to do with the assessments for general taxation (Trans. 131). The assessments themselves show that they were made by the County Assessor (Trans 50-51), as is the case with all real estate in the city. The City Assessor cannot for general taxes raise the assessments of the County Assessor.

Constitution of Missouri, Art. X, Sec. 11;  
Rev. St. Mo. 1919, Sections 13, 150, 13, 154.

As a matter of fact, we do most strenuously contend that the assessment of unplatted, unimproved, outlying tracts in Kansas City for general taxation is as low as twenty per cent and usually even lower. We can prove by evidence, if the question becomes material, that fifteen per cent is not an unusual figure, and that in cases it is even less. The question has not yet become material, because the complainants, while alleging that the tax bills are confiscatory, have adduced no evidence whatever to sustain that allegation, but have left the court to speculate as to what the proportion of assessment may be. This speculation by the court is utterly indefensible.

Even the special assessment made in this grading proceeding by the City Assessor is no evidence of value. As said in *Martin v. N. Y. & N. E. Ry. Co.*, *supra*, "the value of property by assessors is solely for the purpose of determining the amount it shall pay as taxes," and in *Hamilton v. Seaboard Air Line*, *supra*, "It is well understood that it is the custom of the Assessors to fix a uniform rather than an actual valuation." So in this case,

the valuation by the City Assessor was for the purpose of distributing the cost only, not for the purpose of justifying the improvement or determining real values.

Based upon these figures, the lower court found that the total cost of the grading equals approximately twenty-six per cent of the total assessed valuation of the district as fixed by the City Assessor. But there is no evidence that the benefit did not equal twenty-six per cent, or that twenty-six per cent is under the circumstances, confiscatory. The statement of the lower court that the tax bills unreasonably exceed any possible benefit to the benefit district is wholly without justification in the *record*. There is not a scintilla of evidence to support it.

## V.

**Even if it be established by competent evidence that the tax bills against complainants' lands exceed the special benefits thereto, such fact would not be sufficient to invalidate the tax bills.**

There was some general testimony by witnesses Ellison and Jones that complainants lands were not benefited in an amount nearly so great as the tax bills against such lands. This testimony will not warrant setting aside the bills. It has been ~~very~~ times held that whether and to what extent the tax bills exceed in amount the actual benefits to individual tracts, are not judicial questions.

*St. Louis v. Brewing Co.*, 96 Mo., 677, 10 S. W., 477;

*Michael v. St. Louis*, 112 Mo., 610, 20 S. W., 666;

*St. Louis v. Ranken*, 96 Mo. 497, 9 S. W., 910;  
*Chadwick v. Kelley*, 187 U. S. 540, 23 S. Ct., 175;  
*Prior v. Construction Co.*, 170 Mo., 439, 71 S. W.,  
 205;  
*Heman Construction Co. v. Wabash R.R.*, 206  
 Mo. 172, 104 S. W., 67;

## VI.

**The suit in the Circuit Court of Jackson County complies with the provisions of the charter and ordinances and comports with due process of law.**

### A.

It is alleged that the provisions of Section 28 of Article VIII of the charter were not complied with in that no suit was filed "in the name of the city against the respective owners of land chargeable under the provisions of this section with the cost of such work." Inasmuch as the tax bills are made by the charter *prima facie* evidence of the regularity and legality of the entire proceedings, there is a presumption that all necessary steps were duly taken.

Sec. 24, of Art. VIII, Charter of Kansas City;  
*Collins v. Jaicks*, 279 Mo., 404, 214, S. W., 397.

The suit filed in the Circuit Court was entitled "In the Matter of the Grading of Meyer Boulevard from the West Line of Swope Parkway to the East Line of the Paseo, Un-



der Ordinance No. 21831, Approved January 26, 1915." The petition begins:

"Comes now Kansas City, Missouri, by A. F. Evans, City Counselor, and Jay M. Lee, Assistant City Counselor, and alleges....."

A later paragraph begins:

"Kansas City further states and alleges....."

And the prayer is:

"Kansas City also prays the court to find and determine....."

The petition is signed:

"Kansas City, by A. F. Evans, City Counselor, Jay M. Lee, Asst. City Counselor." (Trans. 87-88).

The record entries in the case read:

"Now comes Kansas City....." (Trans. 73-79).

The petition alleges the passage and approval of the grading ordinance and sets it out in full; the approval and adoption of plans and specifications; the making of approximate estimates of cost, of which copies were attached to the petition. It defines and sets forth the limits of the benefit district.

Service was had by publication, the order of publication being directed "To All Persons Whom It May Concern," and containing the substance of the ordinance, the filing of the suit, the limits of the benefit district prescribed by the ordinance, and a notice of the time and place of hearing. (Trans. 97-99). This was in accordance with Section 11 of Article XIII of the charter, under the terms of which Section 28 of Article VIII provides that service shall be made. (Trans. 28-29).

Gertrude P. Brown, one of the complainants in the companion suit now pending in the Circuit Court of Appeals,

8th Circuit, and some other property owners, appeared and answered in the suit. She appeared at the entry of judgment, and later filed a motion for new trial which was overruled and excepted to.

**(1) The proceeding is in the name of the city.**

It is first said that this proceeding is not in the name of the city. There is no merit in the contention for these reasons.

The caption is no part of the petition.

*State v. Patton*, 42 Mo., 530;  
*Livingston v. Coe*, 4 Neb., 379.

The names of the parties need not be set forth in the caption—it is sufficient if they appear in the body of the petition.

*State v. Patton*, 42 Mo., 530;  
*Beattie v. Lett*, 28 Mo., 596.

Even though a statute expressly requires that the parties be named in the caption, the failure of the caption to include them is a mere defect of form, and does not go to the jurisdiction of the court. A judgment rendered on the petition has full force and effect. The defect cannot be taken advantage of in a collateral proceeding.

*Ammerman v. Crosby*, 26 Ind., 451;  
*Smith v. Watson*, 28 Ia., 218.

The fact that a proceeding is entitled "In the Matter of....." instead of having the usual heading naming the parties is quite immaterial so far as the cause of action is concerned.

*In re Clary's Estate*, 112 Cal., 292, 44 Pac. 569.

It is beyond question, therefore, that the caption itself is unimportant, and that the wording of the petition and of the journal entries shows a proceeding in the name of the city.

*Kansas City v. Mastin*, 169 Mo. 80, 68 S. W., 1037.

**(2) The proceeding is against the respective land owners.**

It is next said that the proceeding is not brought against the respective owners of land to be charged. This contention is likewise without merit. The charter provision does not require that the names of all owners shall be set forth in the petition. The provision, reasonably interpreted, means only that the respective owners of land in the district shall be served with process in the proceeding, and be afforded respectively a hearing therein. This is the only reasonable interpretation when we consider that in one proceeding under the Section there may be hundreds of land owners in the benefit district. In such a case it would be well-nigh impossible, and certainly futile, to recite the various names.

It must be borne in mind that the proceeding is purely *in rem*. No judgment is rendered against the owners of property. The tax bills are a lien on the land, and can be enforced against it only. Persons are interested, because their lands are affected, and therefore they should be notified of the pendency of the proceeding, but the suit is in no sense a suit against them.

From the very nature of the proceeding it cannot be a suit against the respective property owners, as complainants interpret the phrase. The charter provision is not to be given the same construction as would be proper were the proceeding *in personam*. If the suit provided for were one *in personam*, against individuals, the interpretation might be otherwise.

It is axiomatic that a petition need state those facts, and no more, which are essential to the cause of action declared on. In the absence of a charter requirement that the names of the property owners be set out in the petition filed in the Circuit Court, it seems clear that those names would not be requisite parts. No relief is asked against the property owners. No allegation could be made against them except that they own the property. There is absolutely no purpose in connecting them with the proceeding in any way except to give them due notice and an opportunity to be heard.

All possible question as to this interpretation is removed by the provisions for the order of publication. In Section 11, Article XIII, which governs service of process in the proceeding, it is expressly provided that the published notice "shall be directed to all persons whom it may concern, without naming them, notifying them of the day

and place." Beyond question, then, the order of publication need not name the individual owners. If so, there is no practical advantage or purpose in stating the names of the owners in the petition.

The purpose of naming the defendants in a suit *in rem* is to give them notice of the pendency of the action. As a matter of practice, this is accomplished by the order of publication. It would seem that if the names need to appear any place in the proceeding, they should be given in the order of publication. Where the charter expressly and unequivocally says that the order of publication need not name the property owners, there is no justification for assuming that the words "against the respective owners" requires that the names appear in the petition.

Special attention is called to that part of Section 11, Article 13, which provides as follows:

"Notice so given by publication shall be sufficient to authorize the court to hear and determine the cause and to make any finding or order or render any judgment therein as fully as though all the parties interested at the time of taking effect of such ordinance or at any time thereafter had been sued by their proper names and had been personally served."

If this section be read in connection with Section 28 of Article VIII, as should be done, there seems to be an express recognition that the owners need not be sued by name.

We submit that the only reasonable interpretation of the clause in question is, not that the names of the respective owners must be set forth in the petition (a useless requirement), but that the respective owners be served with process

and be afforded an individual, not a joint, hearing in the trial of the cause.

So far as the question of notice is concerned, the substantial thing is the order of publication. It is that which is published. It is that which is relied upon to give notice to the property owners of the existence of the proceeding. Where the Charter definitely says that the order of publication need not name the property owners, it is manifest how formal and technical is a requirement, if there be one, that the owners be named in the petition.

Complainants lay much emphasis upon the word "respective." It should be construed with reference to the latter part of the third paragraph of Section 28, which is as follows:

"And the respective owners of lots, tracts and parcels of land within said benefit district shall have the right to introduce evidence tending to show the invalidity or lack of legality of said ordinance, and said proposed lien against the respective lots, tracts and parcels of land owned by each respective defendant."

When the Charter says that the City shall file a proceeding against the respective owners of lands chargeable with the cost of the work, it clearly means that the proceeding shall be filed against those owning the respective tracts in the benefit district. Here is a plain recognition that the proceeding concerns primarily the lots or tracts, and a requirement that the owners of these lots or tracts be afforded a hearing.

Certainly, there is nothing in the word "respective" inconsistent with defendants' interpretation of the provision.

“Respective” has reference only to the causes of action as to the separate or respective lots.

Even if the provision could on any theory be taken to mean that the names of the property owners should appear in the petition, non-compliance would be a defect of form merely, as we have shown, and hence cured by judgment. Moreover, such requirement has been substantially complied with. As Plaintiff’s Exhibit 24 shows, there was filed along with the petition a map or plat, a copy of which is in evidence here as Plaintiff’s Exhibit 12, containing the names of the respective property owners in the district. This map or plat is definitely referred to and identified in Ordinance No. 21831, a certified copy of which was filed with the petition, and made a part thereof, as Exhibit A. The plat may be considered along with the petition in this connection, and if any matter, omitted from the petition proper, is supplied by the plat, the proceeding cannot be complained of.

*Goodrich v. Detroit*, 184 U. S., 432, 22 S. Ct., 397;  
*Kansas City v. Mastin*, 169 Mo., 80, 68 S. W., 1037;  
*Jackson v. Waterway District*, 85 Wash., 301, 147  
 Pac., 1140;

*Reed v. Cedar Rapids*, 137 Ia., 107, 111 N. W., 1013.

Substantial compliance with such a Charter provision is all that is required.

*Ammerman v. Crosby*, 26 Ind., 451;

*Black v. McGonigle*, 103 Mo., 192, 165 S. W., 615.

Furthermore, service of process being had in strict accordance with the Charter, the property owners were duly in court, and defects in the pleadings, not objected to, were waived by all parties.

*State ex rel. v. Lundquist*, 103 Wash., 339, 174 Pac., 440.

The decree of March 29, 1915, approving publication, and finding that lawful service had been had, is conclusive as to all such matters. It must therefore be taken as fact that complainants and other property owners in the district were duly summoned into Court. Complainants are thereby precluded from questioning the defects in pleading now complained of.

*Lingo v. Burford*, 112 Mo., 149, 20 S. W., 459;  
*Nemally v. Joest*, 74 Ind., 409.

As stated by the Supreme Court of Missouri in *Fitzgerald v. De Soto Special Road District*, 195 S. W., 695, 697 (Mo.):

"Where the court had jurisdiction of the subject-matter and person of plaintiff, as in this case, and where the record affirmatively recites the facts necessary to confer jurisdiction, the judgment of said court, in respect to such a matter, is not only conclusive in a collateral proceeding like this, but would be equally so in a direct proceeding in equity, to set aside the judgment, unless it appears that fraud was practiced in the very act of obtaining judgment."



## B.

If, however, the Circuit Court suit is defective, these defects are not fatal since the suit was not necessary to due process. Section 24 of Article VIII of the Charter provides in part:

"The ordinance authorizing any public improvement and the contract therefor, and approving and confirming such contract, shall operate and shall be held by all departments and courts, to cure all errors and irregularities, if any, on the part of the City in the proceedings relating to such improvements, up to and including the time such ordinance take effect, and no tax bills shall be defeated, or the amount or lien thereon in anywise be affected, by reason of any such error or irregularity."

Perhaps this provision of the Charter could not constitutionally be given effect as to defects of substance in prior stages of the proceeding, where such prior stages are requisite to due process of law. For example, if the Circuit Court suit were necessary, in order to comply with the 14th Amendment, a failure to publish the order of publication in that proceeding (a defect which might deprive the court of jurisdiction) could not perhaps, be corrected by some later action of the City Council, though mere defects of form could always be corrected. But if, as in the present situation, the Circuit Court suit, although authorized by the Charter, might be omitted altogether, without affecting the constitutionality of the Section, a totally different consideration applies. Steps in the Circuit Court suit in such case can be changed or done away with or corrected by later proceedings of the council.

To use a simple illustration, let us suppose a charter requirement that after an ordinance to grade has been passed it shall be submitted to the city counselor for his opinion. Suppose a further charter provision that the failure to submit the ordinance to the city counselor shall not invalidate the proceeding. The latter provision would certainly be effective.

The situation under Section 28, Article VIII, is similar. A suit in the Circuit Court is provided for. Such a suit is not essential to due process of law. There is a further provision in the Charter that the ordinance confirming the contract which is passed after the Circuit Court proceeding has been completed, shall cure all errors or irregularities in the prior proceedings. The effect of such a provision is to correct and do away with and render immaterial to the validity of the tax bills all defects whatsoever in the suit.

That the Circuit Court proceedings is not required by due process of law is abundantly established. *Saxton National Bank v. Carswell*, 126 Mo., 436, *supra*, holds constitutional a statute identical, in substantial respects, with Section 28, with the court proceeding eliminated. This statute governs cities of the second class in Missouri, and has been in force for a great number of years. It is embodied in Section 9046-9049, Revised Statutes of Missouri, 1909.

The following cases affirm this conclusion. The hearing which the property owner is afforded in the suit on the tax bill satisfies due process of law.

*Voigt v. Detroit*, 184 U. S., 115, 22 S. Ct., 337;  
*Goodrich v. Detroit*, 184 U. S., 432, 22 S. Ct., 397;  
*Paulsen v. Portland*, 149 U. S., 30, 13 S. Ct., 750;  
*Walston v. Nevin*, 128 U. S., 578, 9 S. Ct., 192.

Of course it is true that if the Circuit Court suit was not had substantially as prescribed by the charter, the judgment could not be *res judicata* of the issues involved, as contended under Point VII of this brief, but so far as affecting the validity of the bills is concerned, the passage of Ordinance No. 24693 renders immaterial all defects in the proceeding.

### C.

**The suit in the Circuit Court comports with due process of law. Service by publication in special assessment proceedings is constitutional.**

*Kansas City v. Duncan*, 135 Mo., 571, 37 S. W., 624;  
*Kansas City v. Ward*, 134 Mo., 172, 35 S. W., 600;  
*Kansas City v. Mastin*, 169 Mo., 80, 68 S. W., 1037;  
*Lent v. Tillson*, 140 U. S., 316, 11 S. Ct., 825.

An order of publication directed to all persons whom it may concern without naming them, meets the constitutional requirement.

*Kansas City v. Ward*, 134 Mo., 172, 35 S. W., 600;  
*Kansas City v. Duncan*, 135 Mo., 571, 37 S. W., 624;  
*State v. Blair*, 245 Mo., 680, 151 S. W., 148.

The order was not improper because it set out the limits only of the benefit district, instead of a legal description of the lands therein. Section 28 provides that the petition shall "define and set forth the limits of the

benefit district", and Section 11 directs that the order recite the substance of the ordinance. This clearly justifies the order as published and is valid.

*State ex rel. v. Wilson*, 216 Mo., 215, 115 S. W., 549.

See also:

*Doris v. Pittsburgh Plate Glass Co.*, 163 Ind., 599,  
70 N. E., 249;

*Cleveland Ry. Co. v. Porter*, 210 U. S., 177, 28 S.  
Ct., 647.

## VII.

**The suit in the Circuit Court finally determined all questions raised or involved therein, and all such questions are now res judicata.**

If Section 28 of Article VIII be constitutional, as we have shown, and if cause No. 90628 was had in due compliance therewith, as we have likewise shown, then it follows that complainants cannot now raise objections open to them in that proceeding. Every issue herein is therefore disposed of by that suit, except the assessment proceedings which did not take place till later. That this would be the effect of an ordinary judgment is conceded. It is contended, however, that the decree in the Circuit Court suit has not such binding force.

It is first argued that the Circuit Court had no jurisdiction to render any judgment with any force. The argument is grounded upon a misunderstanding of the function

which, pursuant to the Charter, the court is to perform. The Circuit Court was not authorized merely to determine the validity of the ordinance, and therefore the proceeding is not similar to those involved in *Muskrat v. U. S.*, 219 U. S., 346; *State ex rel. v. Westport*, 135 Mo., 120, 36 S. W., 663, and other like cases. Such is not the nature of the proceeding. It is not a suit to obtain the opinion of the court as to the constitutionality of Ordinance No. 21831. On the contrary, the object is the fixing of the benefit district.

The Charter clearly authorizes and directs the Court to determine the limits of the district. The second, third and fourth paragraphs of Section 28, Article VIII, provide in part as follows:

"The prayer of the petition shall be that the court find and determine the question of whether or not the respective tracts of land within said benefit district shall be charged with the lien of said work in the manner provided by said ordinance. \* \* \*

In such proceedings the city shall have the right to offer evidence tending to prove the validity of \* \* \* said proposed lien against the respective lots, tracts and parcels of land within said benefit district sought to be charged with such lien; and the respective owners of lots, tracts and parcels of land within said benefit district shall have the right to introduce evidence tending to show the invalidity or lack of legality of \* \* \* said proposed lien against the respective lots, tracts, and parcels of land owned by each respective defendant; and the court shall have the right to determine the question of whether or not the said lots, tracts and parcels of land owned by each defendant should be charged with such lien. \* \* \*

The court shall render judgment either validating such \* \* \* proposed lien against the lots, tracts and parcels of land within said benefit district or against

*such lots, tracts, or parcels of land as the court may find legally chargeable with the same, or the court may render judgment that such \* \* \* proposed lien is, in whole or in part, invalid and illegal."*

It is perfectly evident that the court is to determine the district to be assessed. The court is directed to find and determine whether or not the tracts of each defendant shall be charged with the lien of the work, and shall render judgment invalidating the proposed lien or validating it against such tracts as the court may find legally chargeable therewith.

The evidence authorized to be introduced must be evidence bearing on the question of relative benefits, introduced for the purpose of enabling the court to decide where the limits of the district should be established. And if, from the evidence before it, the court decides that the benefit which will probably accrue to a particular tract is so slight that the tract should not be assessed, that tract may be excluded from the district established.

The petition filed in the case recognizes this principle. Kansas City "prays the court to find and determine the \* \* \* question of whether or not the respective tracts of land within said district shall be charged with the lien of said work", and the order of publication is framed on the same theory.

It is of course true that courts will not take cognizance of mere moot questions and that adjudications in such cases are perhaps binding upon no one. A court will not entertain a suit simply to declare a statute constitutional or unconstitutional. The language of Mr. Justice Brewer in *Tregea v. Modesto Irrigation District*, 164 U. S., 179, 17 S. Ct., 52,

quoted by the lower court in its opinion, was nothing more than an expression of this rule. It has no reference whatever to a suit filed by a city against the owners of property in a benefit district to determine whether the district is a proper and reasonable one with power in the court to exclude property if not benefited and to hold the district invalid if it exclude property that should have been included or is otherwise unfair.

The argument that there were no adverse litigants is wholly untrue. The suit was filed by Kansas City and was a proceeding *in rem* in which the owners of the property were duly brought into court. Several of them actually appeared and contested the litigation. Others made default. All were served and had an opportunity to contest if they desired. The judgment held the ordinance fixing the district valid and adjudged that the lands of the defendant might be charged with the lien of the tax bills. This would seem to be a proper justiciable controversy *in rem*.

*Gibler v. Mattoon*, 167 Ill., 18, 47 N. E., 319;

*Morgan Creek Drainage Dist. v. Hawley*, 255 Ill., 34, 99 N. E., 68;

*People v. Linda Vista Irrigation Dist.*, 128 Cal., 477, 61 Pac., 86;

*Rialto Irrigation Dist. v. Brandon*, 103 Cal., 384, 37 Pac., 484.

There are many cases in which the judgment of the court simply declares or establishes a status. A judgment establishing a will, a decree of divorce, a decree annulling a marriage—are of this character. The judgment in the suit

to quiet title to real estate under the Missouri statutes is analogous.

The case of *In re Union Railway Co.*, 112 N. Y., 61, 19 N. E., 664, is apposite. The statute involved provides for a proceeding to determine whether an elevated railway shall be constructed in the face of the opposition of the property owners affected. The court holds that such a question may properly be passed upon, and that the decision amounts to a judgment *in rem*, conclusive against all mankind.

Complainants sought in the trial court to establish the proposition that the city and the contractor (through whom defendants claim) are not in privity. But no privity is required. This follows as a corollary to the fact that a proceeding *in rem* is not a suit between individuals. Provided there be proper notice, the judgment is conclusive against the whole world. The question of privity or no privity does not enter in.

*Gelston v. Hoyt*, 3 Wheaton, 246;

*Meriwether v. Block*, 31 Mo. App., 170;

*People v. Linda Vista Irrigation Dist.*, 128 Cal., 477, 61 Pac., 86;

*First Nat. Bk. v. McCaskill*, 174 N. C., 362, 93 S. E., 905;

*Christianson v. King County*, 239 U. S., 356, 36 S. Ct., 114.

Complainants could have been heard in the Circuit Court on the question of the reasonableness of the benefit



district; on the claim that their lands were not benefited; on the contention that lands abutting on the improvement were benefited in a greater degree than lands at a distance; on the allegation that the improvement is of a general rather than a local nature; on the suggestion that Swope Park should be in the district; and on any other question going to the validity or propriety of the ordinance fixing the district as it was fixed. Complainants are not entitled to another day in court on these matters but are concluded by the judgment in the Circuit Court.

*St. Louis v. United Rys.*, 263 Mo., 387, 174 S. W., 78;  
*Spratt v. Early*, 199 Mo., 491, 97 S. W., 925.

Every one of the questions mentioned was set up in the answers filed, every one was necessarily involved in the issues before the court and every one was determined by the judgment rendered. If these matters are not rendered *res judicata* by that judgment, then it is difficult to find any scope for the doctrine in any case.

The question of the reasonableness of the benefit district, which as much as anything seemed to move the trial court, was definitely put out of the case by the judgment of the Circuit Court upon that very matter.

*Little River Drainage District v. Railroad*, 236 Mo.,  
 94, 139 S. W., 330;  
*McGhee v. Walsh*, 249 Mo. 266, 155 S. W., 445.

## VIII.

Since the trial and judgment in this case, the Supreme Court of Missouri has decided a case involving all the questions raised in this case.

*Schmelzer v. Kansas City*, 295 Mo. 322, 243 S. W. 946.

This was a suit to enjoin proceedings under Section 28 of Article VIII, similar in all legal respects to the proceedings in controversy. Of course, the improvement was different and other property was included in the benefit district, but all the steps taken were substantially identical with those now under consideration. Every question raised in this case, was urged in that: the invalidity of the method of assessment; the unreasonableness of the benefit district; the unconstitutionality of the proceedings; the excessive amount of the assessment over the benefit; the invalidity and ineffectiveness of the suit in the Circuit Court, because not brought as provided in the charter and because merely declaratory; the lack of due process of law.

The court sustains the proceedings *in toto*, upholding the provisions of the charter and giving effect to the suit in the Circuit Court to its fullest extent as *res judicata*. So far as the Supreme Court of Missouri can establish the validity of a Missouri law and proceedings thereunder, this case has done so, as to the law and proceedings in controversy here.

That court cannot, of course, determine finally the validity or invalidity of a statute under the United States Con-

stitution, yet as to all other questions the decision of the state court is conclusive. The state court having construed Section 28 of Article VIII as requiring only the character of suit filed in the Circuit Court in this proceeding, that holding must be followed here.

*Forsyth v. Hammond*, 166 U. S. 506, 17 S. Ct., 665;  
*Wade v. Travis Co.*, 174 U. S. 499, 19 S. C. 887;  
*Mo. etc. Co. v. Cade*, 233 U. S. 642, 34 S. Ct., 678;  
*Quinette v. Pullman Co.* (C. C. A. 8th Cir.) 229  
 Fed., 333; 143 C. C. A., 453.

This rule is applicable also to the construction of a local, municipal statute.

*Thomas Cusack Co. v. Chicago*, 242 U. S., 526, 37 S.  
 Ct., 190;  
*St. Louis etc. R.R. Co. v. Quinette* (C. C. A. 8th  
 Cir.), 251 Fed., 773, 164 C. C. A., 7.

And the conclusion is inevitable that, since this suit as filed is the suit provided for in the charter, and the service and proceedings thereunder conform to due process of law, the question whether the judgment in the suit is *res judicata* or not becomes one of state law and is conclusively determined by the State Supreme Court.

This eliminates from this appeal every issue except: first, the constitutionality of the assessed valuation method of apportioning benefits; and second, the constitutionality of the appraisement provided for in Section 3 of Article VIII. As to these two issues, the authorities heretofore cited are

absolutely conclusive. They summarily dispose of the case and require the reversal of the judgment and the dismissal of the bill.

Respectfully submitted,

JUSTIN D. BOWERSOCK,

SAM'L J. McCULLOCH,

FRANK P. BARKER,

G. V. HEAD,

*Hunter M. Miller* ~~et al~~ Attorneys for Appellants.

BOWERSOCK & FIZZELL,

MILLER, CAMACK, WINGER & REEDER,

of Counsel.



**McMILLAN CONTRACTING COMPANY ET AL. v.  
ABERNATHY ET AL.**

**McMILLAN CONTRACTING COMPANY ET AL. v.  
HAGERMAN.**

**APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF MISSOURI, TRANSFERRED  
FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH  
CIRCUIT.**

Nos. 167 and 168. Motions to dismiss and to remand submitted  
October 8, 1923.—Decided January 7, 1924.

1. A case in which the jurisdiction of the District Court was invoked by the plaintiff upon the sole ground of a constitutional question, is appealable to this Court exclusively (Jud. Code, § 238); and the presence of other questions, that are not federal questions adequate in themselves to support the original jurisdiction, can afford no ground for appeal to the Circuit Court of Appeals. P. 440.
2. Where a final decree of the District Court which is reviewable only by direct appeal to this Court has been erroneously taken to the Circuit Court of Appeals, it cannot be transferred to this Court under the Act of September 14, 1922, Jud. Code, § 238a, if the time (3 months) allowed for direct appeal here from the District Court had expired when the appeal to the Circuit Court of Appeals was taken. P. 442.

Appeals to review 284 Fed. 354, remanded.

APPEALS taken to the Circuit Court of Appeals from decrees of the District Court enjoining collection of taxes, and transferred by the former court to this Court.

*Mr. Justin D. Bowersock and Mr. Arthur Müller, for appellants, in support of the motions to remand and in opposition to the motions to dismiss. Mr. Samuel J. McCulloch, Mr. Frank P. Barker, Mr. G. V. Head and Mr. Hunter M. Meriwether were also on the briefs.*

*Mr. O. H. Dean, Mr. H. M. Langworthy, Mr. Roy B. Thomson and Mr. Melville W. Borders*, for appellees in No. 167, in support of the motion to dismiss and in opposition to the motion to remand.

*Mr. Albert S. Marley*, for appellee in No. 168, in support of the motion to dismiss and in opposition to the motion to remand.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

These were two bills in equity in the United States District Court brought by citizens of Missouri to enjoin citizens of the same State from proceeding to collect special assessments, of the necessary jurisdictional amount in each case, against complainants' lands in Kansas City for a public improvement, on the ground that the city charter and laws under which the assessments were levied were in conflict with the Fourteenth Amendment of the Federal Constitution. This was the only basis for the jurisdiction of the District Court. The bills also averred that the assessments did not comply with the laws under which they purported to be levied. The defendants in their answers, in addition to a denial of the averments upon which the relief was asked, pleaded a former adjudication of the same causes of action in a Missouri State Court.

The District Court held with the complainants that the charter and laws as carried out in levying the assessments violated the Fourteenth Amendment, overruled the plea of *res judicata* and granted the injunction as prayed. Appeals were perfected to the Circuit Court of Appeals. The appellees moved to dismiss the appeals. They contended that the jurisdiction of the appeals was exclusively in this Court. The Circuit Court of Appeals agreed with them in this but declined to dismiss the

appeals because of an Act of Congress approved September 14, 1922, c. 305, 42 Stat. 837, amending § 238 Jud. Code, by adding a new § 238a, in part as follows:

"If an appeal or writ of error has been or shall be taken to, or issued out of, any circuit court of appeals in a case wherein such appeal or writ of error should have been taken to or issued out of the Supreme Court; . . . such appeal or writ of error shall not for such reason be dismissed, but shall be transferred to the proper court, which shall thereupon be possessed of the same and shall proceed to the determination thereof, with the same force and effect as if such appeal or writ of error had been duly taken to, or issued out of, the court to which it is so transferred."

An order was accordingly made transferring the appeals to this Court. The final decrees of the District Court were entered of record July 7, 1921. The three months in which an appeal could have been taken from that court to this expired on the following October 7 (39 Stat. 727, c. 448, § 6). The appeals to the Circuit Court of Appeals were allowed January 4, 1922.

The appellants move to remand the appeals to the Circuit Court of Appeals with direction to consider them on their merits. The appellees insist that the new § 238a does not apply to the appeals, that they were improperly transferred, and should be remanded with instructions to dismiss.

Two questions are thus presented for our decision:

1st, Did the Circuit Court of Appeals have jurisdiction of the appeals?

2nd, If not, should it have dismissed them instead of transferring them to this Court?

First. The Circuit Courts of Appeals were created by the Act of March 3, 1891, c. 517, 26 Stat. 826. The division of the appellate business between the new courts and this Court was originally provided for in §§ 5 and 6 of



that act. Their substance, with amendments not here material, is now embodied in §§ 238, 128, 239, 240 and 241 of the Judicial Code. Section 238 provides for direct appeals from the District Court to this Court in certified questions of jurisdiction of the District Court, in prize cases, and in all cases in which federal constitutional or treaty questions are involved. Section 128 gives the Circuit Courts of Appeals appellate jurisdiction in all cases other than those in which direct appeals may be taken to this Court under § 238, "unless otherwise provided by law." Except where under § 239 a question may be certified to this Court by a Circuit Court of Appeals, or when under § 240 this Court may bring up a case from the Circuit Court of Appeals by certiorari, the judgments of the Circuit Court of Appeals in cases in which jurisdiction of the District Court is dependent entirely on the diverse citizenship of the parties, in patent and copyright cases, in revenue cases, in criminal cases and in admiralty cases, are made final by § 128. Certain other cases specified in the Act of January 28, 1915, c. 22, § 2, 38 Stat. 803, amending § 128, and in the Act of September 6, 1916, c. 448, § 3, 39 Stat. 726, are also made final in the Circuit Court of Appeals. Judgments of the Circuit Court of Appeals not thus made final and in which more than \$1,000 is involved, may be appealed to this Court under § 241.

The Act of 1891 was passed to relieve this Court from a discouraging congestion of business. It was evidently intended that the Circuit Court of Appeals should do a large part of the appellate business. The act was not happily drawn in defining the division of it between those courts and this Court and many difficulties have arisen. It suffices here to say that, under an unbroken line of authorities, when the plaintiff invokes the jurisdiction of the Federal District Court on the sole ground that his case is one in which a substantial federal constitutional

or treaty question arises, this Court has exclusive appellate jurisdiction thereof under § 238. *American Refining Co. v. New Orleans*, 181 U. S. 277, 281; *Huguley Mfg. Co. v. Galetton Cotton Mills*, 184 U. S. 290, 295; *Union & Planters' Bank v. Memphis*, 189 U. S. 71, 73; *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397, 407; *Carolina Glass Co. v. South Carolina*, 240 U. S. 305, 318; *Raton Water Works Co. v. Raton*, 249 U. S. 552, 553; *Lemke v. Farmers Grain Co.*, 258 U. S. 50, 52.

It is said that there were two other questions involved in these present cases in the District Court in addition to the federal constitutional question, one of conformity of the assessments to the city charter and state law and the other of *res judicata*. But they were not federal questions upon which the jurisdiction of the federal trial court could rest, and therefore could furnish no ground for appeal to the Circuit Court of Appeals under § 128 or other provision of law. To avoid the exclusive appellate jurisdiction of this Court over such an appeal in constitutional or treaty questions under § 238, there must be diversity of citizenship of the parties or the other questions involved must be federal and adequate themselves to support the original jurisdiction. This was expressly ruled in *Lemke v. Farmers Grain Co.*, 258 U. S. 50, 53; *s. c. sub nomine Farmers' Grain Co. v. Langer*, 273 Fed. 635; and obviously follows from the decisions in *Lovell v. Newman & Son*, 227 U. S. 412; *City of Pomona v. Sunset Telephone Co.*, 224 U. S. 330, and *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397, 407.

We conclude that the Circuit Court of Appeals had no jurisdiction of the appeals in these cases and that they should have been dismissed, unless the Act of September 14, 1922, required that court to transfer them.

Second. When the Act of September 14, 1922, was passed, the three months allowed for appeals to this Court in these cases had expired. Appellees urge that even if

the act in terms must be held to apply to these cases, it would be beyond the power of Congress thus to deprive the appellees of their property in the decrees which had vested when the three months had expired.

We do not find it necessary to consider this question or the kindred one whether the Act of 1922 ought to be construed to be prospective and so not to include these appeals. We prefer to put our conclusion on a construction of the act which shall have general application and of which all litigants may have early notice. The time allowed by law for appeals from the District Court to the Circuit Courts of Appeals is in general six months (§ 11, Act of March 3, 1891, 26 Stat. 826, 829, c. 517) or double that allowed for appeals to this Court. We do not think the Act of 1922 applies to any case in which the appeal to the Circuit Court of Appeals is taken after the period for appeals to this Court has expired. Otherwise the act will enable one who negligently has allowed his right of appeal to this Court to go by, to take his appeal to the Circuit Court of Appeals and by transfer get into this Court, and thus lengthen the time for direct appeals to this Court from three to six months. This result we can not assume Congress intended.

As the appeals to the Circuit Court of Appeals were not taken within three months after the decrees appealed from were entered, that court had no power to order a transfer to this Court.

The cases are, therefore, remanded to the Circuit Court of Appeals.